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Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers

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ESTATE PLANNING AND THE LAW OF WILLS AND INHERITANCE FOR SOUTH CAROLINA FARMERS*

DAVID H. MEANS†

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I. INTRODUCTION

A matter daily becoming more important to the South Carolina farm owner is the formulation of a carefully considered plan for the transmission of his wealth at his death to his intended beneficiaries. Urgency of the need for such a plan, which is known as an estate plan, varies from person to person, of course, depending upon such factors as the amount and nature of the wealth, the number and condition of the beneficiaries, their experience in handling such wealth, and many other considerations. Nor is there necessarily a greater need for such estate planning in the case of an owner of agricultural wealth rather than non-agricultural wealth, and many of the matters to be considered are equally important to the farmer and non-farmer. However, because of the nature of his holdings, certain factors are of peculiar importance to the person having agricultural wealth. This bulletin is intended as a discussion for the South Carolina farmer of these peculiar factors, as well as of other matters which should be considered by an owner of any form of wealth.

An information circular heretofore published by Clemson Agricultural College in cooperation with the United States Department of Agriculture¹ briefly outlines what disposition the law will make of the property of a decedent who dies intestate (that is, without having a will). One purpose of this bulletin is to discuss this important topic more fully, as well as to explain certain undesirable consequences which may result from the death intestate of an owner of wealth.

In this State we are not too long removed from the day when a fairly typical farm comprised some fifty to one hundred acres of land and three or four small frame buildings, including a residence and a barn. At the most the equipment necessary to operate such a farm would consist of a minimum of livestock, together with a small investment in such implements as a wagon, handplow, harness, and the usual small tools. Total capital investment in the farming operation would run well below ten thousand dollars. Moreover, the training needed to operate a farm of this type was slight. What was needed was only a limited practical experience and a little technical knowledge. Marketing and finance were simple matters which could be handled sufficiently by persons of limited education.

1. Clemson Extension Service, *What Happens to Your Property After Your Death*, Cir. H. D. 145 (1958).

In contrast with this pattern of the past is the ever increasing complexity of present day South Carolina farming. Due both to the accelerated inflationary trend of the last few years and the technological revolution in agricultural methods, the dollar cost of the modern farm operation is many times that of even a fairly recent era. Today's farmer is aware of the fact that the conduct of a profitable farm operation may necessitate the utilization of 500 to 1000 or more acres of land. Improvements placed upon this land may consist of costly masonry or metal buildings, together with extensive fencing and terracing. Fruit orchards or pasturage may have been established, and expensive irrigation installations constructed. Moreover, in certain types of modern farm operations the moveable equipment needed may approach or exceed the value of the land itself. Due to increasing equipment complexities the present day cost of modern agricultural machinery has become prohibitive for the operator of the small farm of an earlier era. Also, the advent of purebred livestock has necessitated a vastly more expensive investment in farm animals than was required in the past. When all the above factors are considered, therefore, it is readily seen that the capital investment of many farmers may be in excess of \$60,000.

The \$60,000 figure is a significant one, for under the present Federal estate tax law this is the amount of wealth a decedent under all circumstances may transfer to his beneficiaries tax free.² (Although the South Carolina Inheritance Tax commences at a lesser sum,³ since the tax rate is low its impact on a decedent's estate is relatively unimportant.) If, after payment of allowable claims (funeral expenses, administration expenses and debts) against a decedent's estate, the net estate (which for tax purposes may include the value of certain life insurance policies, as well as the value of certain gifts made by the decedent during his life) does not exceed \$60,000, the estate is exempt from Federal taxation. On the other hand, if after payment of allowable claims a decedent's estate exceeds \$60,000, there may or may not be a tax on the excess over \$60,000, depending upon the particular disposition made of the assets of the estate. As a consequence, if a realistic appraisal of a person's wealth (including certain life insurance as well as gifts made during his life) shows that such wealth may exceed in value \$60,000, a consideration of the

2. See p. 569 *infra*.

3. See p. 562 *infra*.

steps which may be taken to eliminate or minimize the effect of the estate tax would seem but elementary prudent husbandry. There is no impropriety in the taking of legitimate steps to minimize one's taxes. As has been well said: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."⁴

Moreover, and quite aside from tax considerations, there are other factors which make indispensable a realistic facing of the unfortunate effect which death may have upon the financial condition of the farm family unit. At one time the family farm was home and way of life as well as means of livelihood, and almost unfailingly operation and occupancy of the farm would continue in the surviving members of the family. Increasingly today the farm has become a highly complex business needing assurance of skilled and technically trained management if it is to continue as a functioning unit.

A primary question to be considered by today's farmer, therefore, is whether the farm is to be disposed of at his death, or whether it is to be retained and its operation continued. Obviously the answer to this question depends upon the individual family situation. At the farm owner's death will there be available managerial talent having the necessary experience and technical training to continue a profitable farming operation?

In one case the widow or a child or son-in-law of the deceased farm owner may be able and willing to supply the necessary management. In a second case any attempt by members of the family to continue farming operations might seem foredoomed to failure and bound to result in a dissipation of the value of the decedent's assets. In the first case the farmer may desire to plan for the continuation after his death of his farming operations. In the second situation he may feel it desirable to plan for the sale of his farming interests at his death. Regardless of which course of action is determined upon as the proper one, in either case the estate planning preparations to be made are of equal importance.

For if operation of the farm is to be continued after death of the owner, legal control must be assured in the successor

4. *Learned Hand in Helvering v. Gregory*, 69 F. 2d 809, 810 (2d Cir. 1934); *cf. Gregory v. Helvering*, 293 U. S. 465, 469 (1935).

manager, free from the competing claims and wishes of other beneficiaries of the decedent. Unless unity of control has been provided for, any continued operation may be rendered impractical, if not impossible, by the breaking up of ownership and control resulting from lack of adequate provision. By the same token, precautions must be taken to protect the interests in the farm assets of these other beneficiaries, or provision for them out of other assets of the estate must be made.⁵ Furthermore, during the lifetime of the owner steps must be taken to insure that there will be available at his death sufficient cash in readily realizable assets — such as bonds — for the payment of claims against his estate, including such items as debts contracted during his life, his funeral expenses, the expenses of administering his estate, and the payment of estate and inheritance taxes. For unless cash to meet such claims is forthcoming at the death of the farm owner, the continued operation of the farm may be impossible because of the necessary forced liquidation of assets to pay claims.

On the other hand, if a farm owner decides that at his death a sale of the farm should be made, the estate planning considerations again will be of importance. Advance planning and provisions can effect an orderly disposition which will result in a smaller shrinkage of assets than that which may result from a too hasty sale necessitated because of the inadequacy of the estate planning.

One caution cannot be too strongly impressed upon the reader of this bulletin. It is not an attempt to make the farmer his own lawyer, and any reader who might consider the preparation of legal instruments is here warned of the serious mishaps which can result from such draftsmanship.

The preparation and execution of the legal documents necessary to effectuate the decisions arrived at by the farm owner is an exacting task, even for the trained and experienced professional. Moreover, the details of property law, and much more frequently, those of tax law, change from time to time. An estate plan is not something which, once prepared, can

5. Should it be decided to retain the farm for the benefit of one or more members of the family, two arrangements, among others, which come to mind are (1) a trust for farm management, and (2) a father-son (or other beneficiary) farm purchase agreement funded with insurance on the father's life. As to trusts for farm management, see the many articles cited in CASNER, ESTATE PLANNING (Cases and Materials) 792 (2d ed. 1956 and Supp. 1959). As to business purchase agreements, see CASNER, *op. cit. supra*, at 740. For a discussion of farm incorporation in an estate plan, see Weaver, *Let's Incorporate Blackacre*, 46 A. B. A. J. 710 (1960).

be dismissed from mind. Changes in the farm owner's financial and family situation, as well as alterations in the law, make necessary a periodic re-examination of the details of any plan already formulated. Thus, not only is the execution of the original plan, but also its periodic reappraisal and updating, necessarily the task of the man with professional training and experience.

The bulletin is designed to alert the farmer to his need for an estate plan, and to familiarize him with some of the various legal devices available for the accomplishment of his wishes. Its purpose is to enable the farmer to give preliminary consideration to his financial and family situation prior to consultation with his lawyer. Such forethought on his part will insure a more intelligent cooperation with his lawyer, thus enabling the latter better to serve the needs of the farmer client.

II. THE NATURE OF PROPERTY AND WAYS IN WHICH IT MAY BE OWNED

For purposes of this bulletin the term property may be defined as those interests which the law recognizes in material things valued by men.⁶ Examples of such material things are land, money, bank deposits, corporate stocks, bonds, farm machinery, livestock, household goods, etc.

A. *Real and Personal Property*

Property is divided into two classes, real and personal property.⁷ Real property consists of interests in land. Minerals in the soil and growing trees are considered land,^{7a} as are things which have been so associated with the use of land as to be treated as a part thereof.⁸ Examples of such things, which are called fixtures, would include buildings, permanent fencing, and other installations permanent in type which are considered to constitute a part of the land on which they have been placed.

Not all interests in land are regarded as real property, however.⁹ If an interest in land is only for a term of years rather than for life or in fee (which, as explained on page 499, means

6. For comparable definitions see: BROWN, PERSONAL PROPERTY § 5, at 6 (2d ed. 1955); 1 TIFFANY, REAL PROPERTY § 1, at 1 (3d ed. 1939).

7. BROWN, *supra* note 6, § 7; 1 TIFFANY, *supra* note 6, § 1.

7a. 1 TIFFANY, *supra* note 6, §§ 587, 590.

8. BROWN, PERSONAL PROPERTY § 137 (2d ed. 1955).

9. BROWN, PERSONAL PROPERTY § 7 (2d ed. 1955).

that it is capable of being inherited by the heirs of the owner), for many purposes it is treated as personal property and not as real property.¹⁰

Personal property includes all interests in things other than land, as well as interests in land which are not regarded as real property because of the fact that such interests are not for life or in fee.¹¹

B. *Present and Future Interests*

Another distinction is that made between present and future interests. If an owner of wealth is entitled to its immediate possession or enjoyment, his interest is present and not future.¹² On the other hand, if his right to possession or enjoyment is only after an interest of another, his interest is future and not present.¹³ For example, if an owner devises (wills) his farm to his widow for her life and at her death, to his son, during the life of the widow the interest of the son is a future interest. Future interests may be created in other forms of wealth as well as in land.¹⁴

C. *Duration of Interests*

How long an interest will continue is also a factor to be considered. In popular usage, when we say that a man owns land, we usually mean that he has an estate in fee simple absolute (sometimes called an estate in fee simple, or merely an estate in fee), the greatest real property interest the law recognizes.¹⁵ The owner of such an interest (called an estate) is privileged to convey his interest to another by deed or to devise it by will at his death, and should he die intestate (without a will) and without having conveyed it away during his lifetime, his interest descends to his heirs.¹⁶

On the other hand, a man may own a lesser estate in land, possibly one which will endure only for his own life. Although such a life tenant may convey his estate by deed, since it will terminate at his death, obviously he cannot devise it nor will it descend at his death to his heirs.¹⁷

10. *Ibid.* See also 1 TIFFANY, REAL PROPERTY § 3 (3d ed. 1939).

11. 1 TIFFANY, REAL PROPERTY § 3 (3d ed. 1939).

12. See generally 1 TIFFANY, REAL PROPERTY § 23 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 4.1 (Casner ed. 1952).

13. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 3 (1st ed. 1951); RESTATEMENT, PROPERTY § 153 (1936).

14. SIMES, *supra* note 13, § 3.

15. 1 TIFFANY, *supra* note 12, § 27.

16. *Id.* § 33.

17. AMERICAN LAW OF PROPERTY § 2.15 (Casner ed. 1952); 1 TIFFANY, *supra* note 12, § 59; RESTATEMENT, PROPERTY § 109 (1936).

Occasionally a person may own an estate in land not for his own life, but for the life of some other person.¹⁸ In such event, if the owner dies first, his interest may be devised,¹⁹ and if not it passes as part of his intestate estate, the interest continuing until the death of that person whose life measures the estate's duration.²⁰ Such a life estate, known as an estate *pur autre vie* (for another's life), is rarely found in present day dispositions of land.

In like manner, an estate for years will continue for the period specified in the lease creating the estate, despite the death of the owner prior to the expiration of such period.²¹

Forms of wealth other than land may be owned absolutely, for life only, or for a term of years.²²

D. Individual Ownership and Cotenancies²³

Wealth may be owned by a person individually or it may be owned jointly with another person or persons.²⁴ Thus, if two or more sons inherit land from their father, they are said to own the land as tenants in common. In such a case, each son (or his heirs or devisees, should he die) is equally entitled to occupy the land and to share in any profits or benefits derived from its use.²⁵ Likewise, each tenant in common can convey his interest to a third person.²⁶ However, until such time as the land is physically divided (partitioned), either by voluntary agreement of the tenants in common²⁷ or by a division

18. See generally 1 TIFFANY, REAL PROPERTY § 49 (3d ed. 1939).

19. CODE OF LAWS OF SOUTH CAROLINA § 19-202 (1952). See RESTATEMENT, PROPERTY § 124 c (1936).

20. If there is no valid devise, the estate passes as assets by descent in the case of a special occupant, and to the personal representative if there is no special occupant. CODE OF LAWS OF SOUTH CAROLINA § 19-708 (1952). There is a special occupancy if the life estate was limited to one and his heirs instead of to him alone *e.g.*, to B and his heirs for the life of C, instead of to B for the life of C. See RESTATEMENT, PROPERTY § 151 (1936).

21. 1 TIFFANY, REAL PROPERTY § 120 (3d ed. 1939).

22. BROWN, PERSONAL PROPERTY § 5 (2d ed. 1955); SIMES, *supra* note 13, § 6.

23. See generally *Cotenancies, Estates of in South Carolina*, 11 S. C. L. Q. 520 (1959). CODE OF LAWS OF SOUTH CAROLINA § 19-55 (1952) provides, "[w]hen any person shall be, at the time of his death, seized or possessed of any estate in joint tenancy the same shall be adjudged to be severed by the death of the joint tenant, and shall be distributable as if the same were a tenancy in common." Since the statute's enactment in 1795, the estate in joint tenancy has been relatively unimportant. For a discussion of its present status see note, 11 S. C. L. Q. 520 (1959).

24. 2 TIFFANY, REAL PROPERTY § 417 (3d ed. 1939).

25. 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

26. *Id.* § 6.10.

27. Although a voluntary division usually is effected by an exchange of deeds, a parol partition is valid where there is sufficient part perform-

had pursuant to a lawsuit (known as a suit for partition²⁸), no one of the original tenants or their successors is entitled to the exclusive possession of any part of the land.²⁹ After such a division is had, however, each would then individually own the portion of land which had been allotted him in the division.³⁰

Such a tenancy in common may result from a devise of land to two or more persons (who may or may not be blood relatives or married to each other), as well as from a conveyance by deed to them.³¹ Likewise, wealth other than land may be owned by persons as tenants in common.³²

As was stated above, when a person dies owning an interest in land as a tenant in common in fee simple absolute, his interest in the land will go to those designated in his will, or to his heirs if he dies intestate.³³ In South Carolina, if an owner of land so desires, however, he can by deed or will provide that his land be held by two or more persons as tenants in common for their joint lives, with the survivor of them taking the entire property in fee simple absolute.³⁴

Likewise, wealth in forms other than land may be similarly held, and not infrequently deposits in banks and saving and loan associations are made subject to the right of withdrawal by either of two persons during their joint lives, with any balance to be paid to the survivor upon the death of the other.³⁵ That United States Savings Bonds may be so held is a matter of common knowledge.³⁶

In some states there is another form of concurrent ownership of wealth known as tenancy by the entirety. This form of ownership, which can exist only between husband and

ance to take the transaction out of the Statute of Frauds. See *Wilson v. Cooper*, 226 S. C. 538, 86 S. E. 2d 59 (1955) and the cases cited therein. See also Annot., 133 A. L. R. 476 (1941).

28. CODE OF LAWS OF SOUTH CAROLINA § 10-28 (1952). Where a division in kind is impractical, the land may be sold and the proceeds of the sale divided. CODE OF LAWS OF SOUTH CAROLINA §§ 10-2208, 2209 (1952).

29. 14 AM. JUR. *Cotenancy* § 24 (1938).

30. 2 TIFFANY, REAL PROPERTY § 428 (3d ed. 1939); 2 AMERICAN LAW OF PROPERTY § 6.19 (Casner ed. 1952).

31. 2 TIFFANY, REAL PROPERTY § 427 (3d ed. 1939).

32. 14 AM. JUR. *Cotenancy* § 19 (1938).

33. 2 AMERICAN LAW OF PROPERTY § 6.5 (Casner ed. 1952).

34. *Davis v. Davis*, 223 S. C. 182, 75 S. E. 2d 46 (1953).

35. CODE OF LAWS OF SOUTH CAROLINA § 8-171 (1952) (bank deposit); CODE OF LAWS OF SOUTH CAROLINA § 8-602 (1952) (savings & loan shares); *Hawkins v. Thackston*, 224 S. C. 445, 79 S. E. 2d 714 (1954), noted 7 S. C. L. Q. 196, 199 (1954).

36. ATKINSON, WILLS 172 (2d ed. 1953).

wife, in some respects resembles a tenancy in common during the joint lives of the husband and wife, with the entire estate going to the survivor of the two.³⁷ Today there can be no tenancy by the entirety in South Carolina,³⁸ but a husband and wife can own property as tenants in common during their joint lives, with the entire interest going to the survivor in fee simple absolute.³⁹

E. Trusts

Often it is desirable to have one or more persons (either natural persons or the trust department of a bank) hold and manage property for the benefit of another person or persons. Property so owned is said to be held in trust.⁴⁰ The person holding property in trust is known as the trustee,⁴¹ the person for whose benefit property is held in trust is the beneficiary,⁴² while the person who created the trust is the settlor.⁴³ An owner may transfer his property in trust for his own benefit, in which case he is both the settlor and the beneficiary.⁴⁴ A trust created by a will is a testamentary trust,⁴⁵ while one created during the settlor's life is called an inter vivos, or living, trust.⁴⁶ If the settlor of a living trust reserves the right to terminate it and take back the trust property, the trust is a revocable one.⁴⁷ The trust is a highly flexible device which has many uses in an estate plan.

F. Powers of Appointment

A person may be given a power (called a power of appointment) to designate (1) who shall take property, or (2) the proportionate shares in which certain persons shall take it.⁴⁸ The person who creates the power (who either may own the property, or himself have only a power) is the donor.⁴⁹ The person given the power is the donee.⁵⁰ The person to whom

37. 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952); 2 TIFFANY, REAL PROPERTY § 430 (3d ed. 1939).

38. Davis v. Davis, 223 S. C. 182, 75 S. E. 2d 46 (1953); Green v. Canady, 77 S. C. 193, 57 S. E. 832 (1907).

39. Davis v. Davis, 223 S. C. 182, 75 S. E. 2d 46 (1953).

40. RESTATEMENT, TRUSTS § 2 (2d ed. 1959).

41. RESTATEMENT, TRUSTS § 3 (3) (2d ed. 1959).

42. RESTATEMENT, TRUSTS § 3 (4) (2d ed. 1959).

43. RESTATEMENT, TRUSTS § 3 (1) (2d ed. 1959).

44. RESTATEMENT, TRUSTS § 114 (2d ed. 1959).

45. See BOGERT, HANDBOOK OF THE LAW OF TRUSTS 71 (3rd ed. 1952).

46. *Ibid.*

47. See BOGERT, *supra* note 45, at 574. The settlor likewise may give a power to revoke or terminate the trust to a third person. *Ibid.*

48. RESTATEMENT, PROPERTY § 318 (1936).

49. RESTATEMENT, PROPERTY § 319 (1) (1936).

50. RESTATEMENT, PROPERTY § 319 (2) (1936).

the donee appoints the property is the appointee.⁵¹ The person who will take the property should the donee fail to make an effective appointment is the taker in default of appointment.⁵² To illustrate, A (donor) might will certain property to his wife for her life with remainder at her death to such person as A's wife (donee) shall appoint, and in default of appointment to A's children (takers in default of appointment) in equal shares. The wife's power to appoint the property to any person (including herself or her estate) is a general power of appointment.⁵³ On the other hand, if the wife was only given power (1) to appoint the property to one or more of a limited group of persons which does not include herself (for example, the children of A), or (2) to determine the proportionate share each member of the group would take, the power would be a special one.⁵⁴ If (as frequently is the case) the donor of a power of appointment has provided that the donee may appoint only by will and not by a deed, the power is a testamentary one.^{54a}

The person who creates a power of appointment can presently dispose of his property as now seems best, while providing for a changed disposition to be made by the donee if a change should later become advisable. Thus in the example above, the power given Mrs. A will enable her to determine the final disposition of her husband's property in light of the family situation years after his death. Since a power of appointment adds such a highly desirable flexibility to an estate plan, it is a favorite tool of estate planners.

III. HOMESTEAD⁵⁵

A. *Head of a Family*

In South Carolina the head of a family is entitled to a homestead in land, whether held in fee or any lesser estate, to the value of \$1,000.⁵⁶

51. RESTATEMENT, PROPERTY § 319 (4) (1936).

52. RESTATEMENT, PROPERTY § 319 (5) (1936).

53. RESTATEMENT, PROPERTY § 320 (1) (1936). Subject to certain exceptions, a power of appointment is a general one for federal estate and gift tax purposes if it is exercisable in favor of the donee, his estate, his creditors, or the creditors of his estate. INT. REV. CODE OF 1954 §§ 2041(b) (1), 2514(c).

54. RESTATEMENT, PROPERTY § 320 (2) (1936).

54a. RESTATEMENT, PROPERTY § 321 (1) (1936).

55. See *Dorn v. Stidham*, 139 S. C. 66, 77, 137 S. E. 331 (1927), for a brief survey of past and present homestead legislation in South Carolina.

56. S. C. CONST. art. 3, § 28; CODE OF LAWS OF SOUTH CAROLINA § 34-1 (1952).

As used in the homestead provisions, family means "the collective body of persons who live in one house, and under one head or manager. . ."⁵⁷ Although an unmarried man with no persons dependent upon him and living alone except for servants and employees is not the head of a family,⁵⁸ yet a son who supported his widowed mother has been so regarded⁵⁹ as has a single woman with whom lived a dependent sister,⁶⁰ a widower with whom lived an adopted daughter,⁶¹ and a widower with whom lived an adult son.⁶² A husband separated for many years from his wife was held to be entitled to homestead as the head of a family, since the separation had not freed him of liability for the support of his wife, even though in fact she was self supporting.⁶³

It is not necessary that the relation of husband and wife or parent and child exist,⁶⁴ or that there be any blood relationship between one claiming to be head of a family and the members thereof.⁶⁵ Nor need there be a legal obligation on the head of a family to support the members thereof; the cases have held that a moral duty to support is sufficient.⁶⁶ Thus a widower supporting his deceased wife's niece, who, when not in school, lived part of the time with him, was held to be entitled to homestead as the head of a family.⁶⁷

Suppose that a woman owning land in her own name is married to the head of a family who either owns no land, or owns land worth less than \$1,000 in value. In such a case the wife is entitled to claim homestead in so much of her land as is necessary to complete the family's exemption of \$1,000 in land.⁶⁸

57. *Moyer v. Drummond*, 32 S. C. 165, 167, 10 S. E. 950, 952 (1889); *Rollings v. Evans*, 23 S. C. 316, 326 (1885). Compare *In re Opava*, 235 F. 779 (N. D. Iowa 1916).

58. *Garaty & Armstrong v. Dubose*, 5 S. C. 493 (1875); *In re McGowan*, 170 F. 493 (Dist. Ct. S. C. 1909).

59. *Scott & Nobles v. Mosely Bros.*, 54 S. C. 375, 32 S. E. 450 (1889).

60. *Chamberlain v. Brown*, 33 S. C. 597, 11 S. E. 439 (1890).

61. *Wagener v. Parrott*, 51 S. C. 489, 29 S. E. 240 (1898).

62. *Rollings v. Evans*, 23 S. C. 316 (1885).

63. *Appeal of Brookland Bank*, 112 S. C. 400, 100 S. E. 156 (1919). Cf. *Tarleton v. Thompson*, 125 S. C. 182, 118 S. E. 421 (1922), in which a widow abandoned by her husband was allowed a homestead exemption in his personal estate. See Annot., 118 A. L. R. 1386 (1938).

64. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1925); *Fant v. Gist*, 36 S. C. 576, 15 S. E. 721 (1891); *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 950 (1890).

65. *Fant v. Gist*, 36 S. C. 576, 15 S. E. 721 (1891).

66. *Fant v. Gist*, 36 S. C. 576, 15 S. E. 721 (1891); *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 950 (1890).

67. *Fant v. Gist*, 36 S. C. 576, 15 S. E. 721 (1891).

68. S. C. CONST. art. 3, § 28; CODE OF LAWS OF SOUTH CAROLINA § 34-61 (1952).

*B. Interests in Land in Which Homestead May be Claimed*⁶⁹

The head of a family need not live on the land in which he claims homestead.⁷⁰ However, only a resident of South Carolina is entitled under the State's homestead laws, and if he moves from the State his right of homestead is lost.⁷¹

If the debtor's interest in land is less than that of fee simple ownership, the value of such limited interest (rather than the value of a fee simple interest) is the proper basis for ascertaining the exemption.⁷² Thus a debtor's life interest in a lot and dwelling house worth \$5,000 was exempt from execution and sale, since the value of the life interest was less than \$1,000, the amount of the homestead exemption.⁷³ Likewise, a debtor may claim homestead in land which he holds only for a term of years.⁷⁴

Homestead may be claimed not only in estates in possession, but also in estates in reversion or remainder.⁷⁵ For example, suppose that land is devised to A for life, remainder to B in fee simple. Not only may A claim homestead in his life estate, but B, during A's lifetime, likewise may claim homestead in his estate in remainder.⁷⁶

Homestead may be claimed in equitable estates as well as in legal ones.⁷⁷ Thus a debtor in possession of land under a contract to purchase is entitled, after payment in full of the purchase money, to claim his homestead therein, even though he may not have acquired a formal legal title.⁷⁸

69. Annot., 89 A. L. R. 511 (1934).

70. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1925); *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897 (1887); *Swandale v. Swandale*, 25 S. C. 389 (1886).

71. *Bonebrake v. Morrow*, 183 S. C. 170, 190 S. E. 506 (1937); *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1925); *Bailey & Sons v. Wood*, 71 S. C. 36, 50 S. E. 631 (1904); *Trimmier v. Winsmith*, 41 S. C. 109, 19 S. E. 283 (1894).

72. *Bank of Columbia v. Gibbes*, 54 S. C. 579, 32 S. E. 690 (1899).

73. *Ibid.*

74. See Annot., 89 A. L. R. 511, 555 (1934).

75. *Gibbes v. Hunter*, 99 S. C. 410, 83 S. E. 606 (1914).

76. *Ibid.*

77. *Munro v. Jeter*, 24 S. C. 29 (1885); *Ex parte Kurz*, 24 S. C. 468 (1885). See Annot., 89 A. L. R. 511, 526 (1934). See *Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790 (1887), *Ex parte Allison*, 45 S. C. 338, 343, 23 S. E. 62 (1895). *But cf. Hallman v. George*, 70 S. C. 403, 50 S. E. 24 (1905), refusing to order a reconveyance of land which had been conveyed to secure a debt until other debts owed by the grantor to the grantee were also paid, despite the grantor's claim of homestead against the other debts, on the theory that he who seeks equity must do equity. The statement in *Garaty and Armstrong v. Dubose*, 5 S. C. 493 (1875), that homestead is allowable only when the debtor has leviable interest in land was repudiated in *Munro v. Jeter*, 24 S. C. 29 (1885). See *McNair v. Moore*, 64 S. C. 82, 90, 41 S. E. 829 (1902).

78. *Munro v. Jeter*, 24 S. C. 29 (1885).

If land is owned by the debtor and others as tenants in common, the debtor will be allowed his homestead in the land as against the claims of his creditors, but not as against the claims of his cotenants, so as to defeat their right of partition, or an accounting for rents and profits received by him.⁷⁹ Although homestead cannot be assigned the debtor out of his undivided interest as tenant in common,⁸⁰ the court may restrain an execution sale of such interest until a partition (judicial division of the land) is made, after which the debtor will be entitled to an assignment of homestead out of the land allotted him.⁸¹ In like manner, if instead of being divided among the tenants in common the land is sold for partition, the debtor is entitled to homestead exemption out of his share of the proceeds of sale.⁸²

C. *Claims Subordinate to Homestead*

In general, the homestead in land, together with the yearly products thereof, is exempt from seizure and sale for payment of the debts of the head of the family.⁸³

D. *Claims Paramount to Homestead*

If the debtor acquired the land subject to the lien of a mortgage given by a prior owner, the mortgage lien is superior to the debtor's claim of homestead.⁸⁴ The same also is true if the debtor mortgages his land before a homestead therein has been assigned him.⁸⁵ (As will be discussed later, after a homestead in land has been set off and recorded, such homestead cannot be waived by deed of conveyance, mortgage, or otherwise, unless the same be executed by both husband and

79. *Peets v. Wright*, 117 S. C. 409, 109 S. E. 649 (1921); *Tedder v. Tedder*, 115 S. C. 91, 98, 104 S. E. 318 (1920). See Annot., 140 A. L. R. 1170 (1942); Annot., 89 A. L. R. 511, 540 (1934).

80. Among the cases are *Eaddy v. Wall*, 183 S. C. 229, 190 S. E. 497 (1936); *Ketchin v. Patrick*, 32 S. C. 443, 11 S. E. 301 (1890); *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333 (1888); *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897 (1887).

81. *Barron v. English*, 128 S. C. 332, 121 S. E. 782 (1924); *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897 (1887).

82. *Gibbes v. Hunter*, 99 S. C. 410, 83 S. E. 606 (1914); *Ex parte Carraway*, 28 S. C. 233, 5 S. E. 597 (1888); *Swandale v. Swandale*, 25 S. C. 389 (1886); *Norton v. Bradham*, 21 S. C. 375 (1884).

83. CODE OF LAWS OF SOUTH CAROLINA § 34-1 (1952).

84. 5 TIFFANY, REAL PROPERTY § 1336 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 5.96 (Casner ed. 1952).

85. *Homestead Ass'n. v. Enslow*, 7 S. C. 1 (1876). See also *Reid v. McGowan*, 23 S. C. 74, 5 S. E. 215 (1888); *Smith v. Mallone*, 10 S. C. 39 (1878); *Rosenberg v. Levi*, 7 S. C. 344 (1876). See generally 1 AMERICAN LAW OF PROPERTY § 5.89 (1952); Annot., 123 A. L. R. 427 (1939).

wife, if both be living.⁸⁶) Nevertheless, even though the mortgage lien is superior to the debtor's claim of homestead, the debtor is entitled to homestead in any proceeds of sale remaining after payment of the amount secured by the mortgage.⁸⁷

The law is somewhat confused as to whether or not homestead can be claimed against other liens attaching to the land before its owner became entitled to homestead.⁸⁸ For example, where a judgment debtor's present homestead claim arose after a judgment lien attached, but before a sale of the land under execution, the debtor was held to be entitled to homestead.⁸⁹ However, where land of a debtor had been attached (judicially seized) before the debtor moved to South Carolina and became entitled to homestead, it was held that the creditor's claim by virtue of the attachment was superior to the debtor's subsequently acquired right of homestead.⁹⁰

The homestead exemption is inferior to claims for taxes,⁹¹ as well as to obligations contracted for the purchase of the homestead⁹² or the erection or making of improvements or repairs thereon.⁹³ Thus a purchaser of land at a tax sale takes free of the delinquent owner's claim of homestead.⁹⁴ Likewise, if a seller of land sues the buyer to whom he has conveyed and obtains a judgment for an unpaid portion of the purchase price, the buyer cannot claim homestead against the seller's judgment for the unpaid purchase price.⁹⁵ However, if the buyer borrowed from a third person the money with which he purchased the land, the buyer can claim homestead against that person, since only a debt due the seller is considered an

86. See p. 512 *infra*.

87. *Calmes v. McCracken*, 8 S. C. 87 (1876).

88. Annot., 110 A. L. R. 883 (1937); Annot., 110 A. L. R. 904 (1937).

89. *Chafee v. Rainey*, 21 S. C. 11 (1884); *Rollings v. Evans*, 23 S. C. 316 (1885). *But see Bonebrake v. Morrow*, 183 S. C. 170, 190 S. E. 506 (1937); *Pender v. Lancaster*, 14 S. C. 25 (1880). The S. C. cases are discussed in Annot., 110 A. L. R. 883, 896 (1937).

90. *Bonebrake v. Morrow*, 183 S. C. 170, 190 S. E. 506 (1937). See Annot., 110 A. L. R. at 904 (1937).

91. CODE OF LAWS OF SOUTH CAROLINA § 34-62 (1952); *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330 (1889); *Oliver v. White*, 18 S. C. 235 (1883).

92. CODE OF LAWS OF SOUTH CAROLINA § 34-62 (1952); *Calhoun v. Calhoun*, 2 S. C. 283 (1870). See *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829 (1902).

93. CODE OF LAWS OF SOUTH CAROLINA § 34-62 (1952); *Betts & Co. v. Richardson*, 112 S. C. 279, 99 S. E. 815 (1919); *All v. Goodson*, 33 S. C. 229, 11 S. E. 703 (1890); *Allen v. Harley*, 3 S. C. 412 (1872).

94. *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330 (1889).

95. CODE OF LAWS OF SOUTH CAROLINA § 34-62 (1952); *Calhoun v. Calhoun*, 2 S. C. 283 (1870).

obligation for the purchase money.⁹⁶ (Of course, the third party lender could have protected himself by taking a mortgage on the land.)

If the debtor is a member of a partnership, he is not entitled to a homestead exemption out of the partnership assets until the partnership debts are first paid.⁹⁷ But he is entitled to homestead in partnership property as against his individual debts,⁹⁸ as well as to homestead in individual property as against partnership debts.⁹⁹

The yearly products of the homestead are “. . . subject to attachment, levy and sale to secure or enforce the payment of obligations contracted for provisions or other necessary articles purchased or advances in money or merchandise procured to be used or expended in the production of such yearly products or of other obligations contracted in the production thereof. . .”¹⁰⁰ Thus crops grown on the homestead are not exempt from levy to enforce payment for fertilizer purchased by the debtor and used on the homestead.¹⁰¹

E. Homestead When Head of Family is Dead

If the head of the family be dead, his widow and children, or, if the wife also be dead, the children living on the homestead (regardless of whether or not they be minors) are entitled to the same exemption against the debts of the deceased head of the family that he would be entitled to if alive.¹⁰²

The preceding paragraph assumes, as does the balance of this section, that the widow and children have acquired land, either by inheritance or devise, from the deceased head of the family. On the other hand, if he owned no land at his death, or if he owned land but devised it to other persons, the widow

96. *In re Bailes*, 176 F. 460 (Dist. Ct. S. C. 1909); *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829 (1902); *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39 (1900); *Calmes v. McCracken & Koon*, 8 S. C. 87 (1876). *Cf.* *Cannon v. Dexter Broom and Mattress Co.*, 120 F. 657 (4th Cir. 1903).

97. CODE OF LAWS OF SOUTH CAROLINA § 52-52 (2) (c) (1952); *Regenstein v. Pearlstein*, 32 S. C. 437, 11 S. E. 298 (1890). See Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina*, 4 S. C. L. Q. 64, 88 (1951).

98. CODE OF LAWS OF SOUTH CAROLINA § 52-55 (3) (1952); *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952 (1890). See Karesh, *supra* note 97, at 89.

99. *Chalmers v. Turnipseed*, 21 S. C. 126 (1883). See Karesh, *supra* note 97, at 89.

100. CODE OF LAWS OF SOUTH CAROLINA § 34-62.1 (1952).

101. *White v. Barbary*, 103 S. C. 223, 88 S. E. 132 (1916).

102. CODE OF LAWS OF SOUTH CAROLINA § 34-11 (1952); *Ex parte Cothran*, 128 S. C. 122, 121 S. E. 556 (1924). See *Dorn v. Stidham*, 139 S. C. 66, 83, 137 S. E. 331 (1925).

and children, of course, would acquire from him no land in which to claim homestead.¹⁰³ This power of the husband by devise to prevent his widow from claiming homestead in his land exists only if homestead was not set off to the family during the life of the husband. As will be discussed later (page 512), if homestead was so set off during the husband's life, thereafter he has no power by deed, mortgage or devise to deprive the wife of the enjoyment of the homestead for her life.¹⁰⁴

If both a widow and children survive the head of the family, the widow is not entitled to homestead to the exclusion of the children.¹⁰⁵ Moreover, if the widow takes dower in the lands of her deceased husband, she is not entitled to share in the partition (a division of land, or the proceeds of its sale) of the homestead set off to her and the children.¹⁰⁶

If the deceased head of a family leaves only a widow and no children, the widow is entitled to her husband's homestead exemption against the claims of his creditors.¹⁰⁷ However, she may not claim homestead exemption in her own property, as against her own debts while unmarried, unless she herself can qualify as the head of the family, or while married, unless her husband has not sufficient property of his own to constitute the homestead.¹⁰⁸

The homestead exempted to the widow and children of the deceased head of a family is subject to partition (either a division of the land, or a sale thereof and a division of the pro-

103. *Ex parte* Bullock, 58 S. C. 238, 36 S. E. 563 (1900). See *Ex parte* Cothran, 128 S. C. 122, 121 S. E. 556 (1924). But a mere testamentary direction for payment of debts does not defeat the homestead claim of the widow and children, *Ex parte* Cothran, *supra*; Dorn v. Stidham, 139 S. C. 66, 137 S. E. 331 (1927); Annot., 103 A. L. R. 257 (1936); nor does a direction to sell and pay debts. *Hendrix v. Seaborn*, 25 S. C. 481 (1886).

104. CODE OF LAWS OF SOUTH CAROLINA § 34-13 (1952); *Davis v. Milady*, 92 S. C. 135, 75 S. E. 363 (1912).

105. *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031 (1900); *Ex parte* Worley, 49 S. C. 41, 26 S. E. 949 (1897).

106. *Kennedy v. Kennedy*, 74 S. C. 541, 54 S. E. 773 (1906); *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031 (1900); *Glover v. Glover*, 45 S. C. 51, 22 S. E. 739 (1885). See *Dorn v. Stidham*, 139 S. C. 66, 84, 137 S. E. 331 (1927). If a decedent's will required no election between dower and the testamentary provisions made for the widow, it would seem that she could share in the partition of the homestead, provided she had been devised an interest therein.

107. *Broughton v. Broughton*, 93 S. C. 26, 75 S. E. 1027 (1912); *Bradley v. Rodelsperger*, 3 S. C. 226 (1876) [holding explained in *Bradley v. Rodelsperger*, 17 S. C. 9 (1882)].

108. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1925). See *Lanham v. Glover*, 46 S. C. 65, 24 S. E. 49 (1896) (where homestead against the decedent's debts had been allotted his widow and children, the widow could not claim homestead in her separate estate against her own debts).

ceeds) among the widow (unless she took dower)¹⁰⁹ and children just as though no debts of the head of the family existed.¹¹⁰ However, no partition may be had until the youngest child becomes 21 years of age, unless such is shown to be for the minor's best interest.¹¹¹ If the head of a family leaves a widow but no minor child or children, the homestead may be partitioned at once among the widow and adult children.¹¹² Likewise, if there be a widow but no children, the homestead is subject to immediate partition between the widow and the other heirs of her deceased husband.¹¹³

If the head of a family leaves neither a widow nor children living on the homestead, the right to claim a homestead exemption expires at his death, and does not pass to his adult children who live in homes of their own.¹¹⁴

F. *How Homestead is Claimed*

Before the sheriff or other officer may sell the land of any head of a family resident in South Carolina, he first must have a homestead set off to such person.¹¹⁵ In general, the manner in which this is done is as follows. Pursuant to public notice, three appraisers, one of whom is named by the selling officer, one by the debtor, and one by the creditor, appraise the debtor's land and set off to him a homestead therein, not to exceed the value of \$1000.¹¹⁶ Both the creditor and the debtor may appeal to the court from the appraisers' action, in which event the court, upon good cause being shown, may order a reappraisal and reassignment of the homestead by other appraisers appointed by the court.¹¹⁷ However, if neither the debtor nor the creditor appeal within thirty days after the filing of the return of the appraisers, their action becomes final.¹¹⁸ Upon the recording of the return of the appraisers,

109. See note 106 *supra*.

110. CODE OF LAWS OF SOUTH CAROLINA § 34-12 (1952); Annot., 159 A. L. R. 1129, 1152 (1945).

111. CODE OF LAWS OF SOUTH CAROLINA § 34-12 (1952).

112. *Ex parte* Worley, 54 S. C. 208, 32 S. E. 307 (1899). See cases in note 106 *supra*.

113. *Broughton v. Broughton*, 93 S. C. 26, 75 S. E. 1027 (1912); *Saunders v. Strobel*, 64 S. C. 489, 42 S. E. 429 (1902).

114. *In re Snoddy's Estate*, 201 S. C. 14, 21 S. E. 2d 198 (1942). *Contra*, *Spigener v. Crews*, 111 S. C. 281, 97 S. E. 838 (1918), in which children of a deceased widow were allowed homestead in her land, despite the fact they lived in homes of their own. The Spigener case ignores the language of the statute. CODE OF LAWS OF SOUTH CAROLINA § 34-11 (1952).

115. CODE OF LAWS OF SOUTH CAROLINA § 34-2 (1952).

116. *Ibid*.

117. CODE OF LAWS OF SOUTH CAROLINA § 34-3 (1952).

118. *Ibid*.

if unappealed from, or if such return be finally heard and approved, within forty days after the proceedings become final, the title to the homestead so set off is forever discharged from debts of the debtor then existing or thereafter contracted.¹¹⁹

If in the assignment of a homestead the appraisers find that the debtor's land is worth more than \$1000, and that it is incapable of division (for example, a house and lot) the debtor may pay to the sheriff the amount of the appraised value over \$1000.¹²⁰ If this is done, the entire lot thereafter is discharged from the debtor's then existing debts, but the surplus value above \$1000 remains liable for any debts which the debtor thereafter may incur.¹²¹ To illustrate, suppose that the head of a family owes \$2,000, and the appraised value of his land is \$1500. If he pays \$500, the surplus value, to the sheriff, the land thereafter cannot be sold for payment of the \$1500 still owing on the debt. However, if thereafter the debtor incurs another debt in amount \$700, the land is liable for payment of this debt to the extent of \$500, the surplus value above the homestead exemption of \$1,000.

If within sixty days after notice of the land's appraised value, the debtor fails to pay the amount in excess of \$1000 to the sheriff, the land will be sold at public auction, and the proceeds of sale above \$1000, after payment of expenses of the appraisal and sale, will be applied to payment of executions against the debtor which have been filed with the sheriff.¹²² Unless more than \$1000 is bid at the auction sale, the land will not be sold.¹²³

Even though no legal proceeding has been brought against his land, a landowner entitled to homestead may apply at any time to the master of the county, or if there be no master, to the clerk of court, to have a homestead appraised and set off in the land.¹²⁴ Pursuant to public notice, three appraisers appointed by the master appraise the land and set off a homestead therein in the manner above described.¹²⁵ Creditors of the land owner and other persons interested may except to the appraisal within thirty days after the return of the appraisers, in which event the circuit court, upon good cause

119. CODE OF LAWS OF SOUTH CAROLINA § 34-4 (1952).
 120. CODE OF LAWS OF SOUTH CAROLINA §§ 34-5, 6 (1952).
 121. CODE OF LAWS OF SOUTH CAROLINA § 34-6 (1952).
 122. CODE OF LAWS OF SOUTH CAROLINA § 34-7 (1952).
 123. *Ibid.*
 124. CODE OF LAWS OF SOUTH CAROLINA § 34-8 (1952).
 125. CODE OF LAWS OF SOUTH CAROLINA § 34-9 (1952).

being shown, may order a reappraisement and assignment of the homestead by other appraisers.¹²⁶ However, if no exception is taken within the said thirty days, the appraisalment will be confirmed by the circuit court and recorded.¹²⁷

G. *Waiver of Homestead*

Even though homestead has not been assigned, the right to claim it may not be waived except by a deed of conveyance, or by a mortgage, in which case the waiver is only for the mortgage debt.¹²⁸ Nor can a judgment creditor or other creditor whose lien (security interest in the land) does not bind the homestead require that a lien which embraces both the homestead and other land first exhaust (sell for the debt) the homestead before resorting to the other land covered by the lien.¹²⁹

After a homestead has been set off and recorded, it cannot be waived by a deed of conveyance, mortgage, or other wise, unless the waiver be executed by both husband and wife, if both be living.¹³⁰

If homestead is not assigned during the life of the husband, he may will his lands to other persons, free of his family's claim of homestead.¹³¹ However, if an assignment was made during the husband's life, any person to whom he wills the homestead takes it subject to the widow's right to exclusive occupation and enjoyment during her life.¹³²

H. *Exemption in Things Other Than Land*

Things other than land owned by the head of a family residing in South Carolina are exempt from judicial sale for debt to the extent of \$500.¹³³ In like manner, a person not the head of a family is entitled to an exemption not to exceed the value of \$300 in his necessary wearing apparel and tools and implements of trade.¹³⁴ In general, the procedure for setting

126. *Ibid.*

127. *Ibid.*

128. CODE OF LAWS OF SOUTH CAROLINA § 34-13 (1952).

129. CODE OF LAWS OF SOUTH CAROLINA § 34-13 (1952); *People's Bank v. O'Shields*, 167 S. C. 296, 166 S. E. 351 (1932).

130. CODE OF LAWS OF SOUTH CAROLINA § 34-13 (1952). In *Baker v. De Witt*, 140 S. C. 114, 138 S. E. 626 (1927), a bankrupt had failed to record proceedings in bankruptcy setting aside homestead. It was held that because of the failure to record, the homestead had been waived by the bankrupt's subsequent execution and delivery of a mortgage in which his wife did not join as mortgagor.

131. See cases cited in note 103 *supra*.

132. *Davis v. Milady*, 92 S. C. 135, 75 S. E. 363 (1912).

133. CODE OF LAWS OF SOUTH CAROLINA § 34-41 (1952).

134. *Ibid.*

aside the exempted things is similar to that provided where land is involved.¹³⁵ Also, as in the case of land, there are certain debts against which the exemption may not be claimed.¹³⁶

IV. MARITAL INTEREST

A. Dower

In general, a widow is entitled to dower in lands her husband owned during their marriage.¹³⁷ Usually the dower interest is a life estate in one third of the land,¹³⁸ but if the land is of a kind that cannot be divided (for example, a city lot) the value of the widow's one-third interest for life may be paid her in money.¹³⁹ When the money value of dower is calculated it usually is set at one-sixth the value of the land.¹⁴⁰ (For example, if the land is worth \$6000, the dower interest is worth \$1000.) Generally speaking, the dower interest of the widow is paramount to the debts of the husband and to claims against his estate.¹⁴¹

1. Interests in Which Dower Exists

The widow is entitled to dower only in those lands in which her husband owned an estate of inheritance.¹⁴² (The estates of inheritance are discussed in the paragraphs which follow.) Thus, the wife has no dower in land which her husband owned only for a term of years,¹⁴³ or even for his own life,¹⁴⁴ or for the life of another person.¹⁴⁵

135. CODE OF LAWS OF SOUTH CAROLINA §§ 34-41, 42 (1952).

136. See pp. 506, 507 *supra*.

137. CODE OF LAWS OF SOUTH CAROLINA § 19-161 (1952); *Elder v. McIntosh*, 88 S. C. 286, 70 S. E. 807 (1911). See *Boykin v. Springs*, 66 S. C. 362, 370, 44 S. E. 934 (1903); 2 TIFFANY, REAL PROPERTY § 487 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 5.1 (Casner ed. 1952).

138. CODE OF LAWS OF SOUTH CAROLINA § 19-163 (1952); 2 TIFFANY, REAL PROPERTY § 487 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 5.1 (Casner ed. 1952).

139. CODE OF LAWS OF SOUTH CAROLINA § 19-166 (1952).

140. *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031 (1900); *Jefferies v. Allen*, 34 S. C. 189, 13 S. E. 365 (1891); *Stewart v. Pearson*, 4 S. C. 4 (1872).

141. *Elder v. McIntosh*, 88 S. C. 286, 70 S. E. 807 (1911); *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. 1031 (1900); *Hall v. Hall*, 45 S. C. 166, 22 S. E. 818 (1895); 2 TIFFANY, REAL PROPERTY § 487 (3d ed. 1939); 17A AM. JUR. DOWER § 68 (1957).

142. CODE OF LAWS OF SOUTH CAROLINA § 19-161 (1952); *Spann v. Carson*, 123 S. C. 371, 116 S. E. 427 (1923); *Milledge v. Lamar*, 4 Desaus Eq. 617, 638 (S. C. 1817). See generally 1 AMERICAN LAW OF PROPERTY § 5.22 (Casner ed. 1952).

143. *Whitmire v. Wright*, 22 S. C. 446 (1885).

144. See cases note 142 *supra*; 2 TIFFANY, REAL PROPERTY 496 (3d ed. 1939). 1 AMERICAN LAW OF PROPERTY § 5.22 (Casner ed. 1952).

145. 2 TIFFANY, REAL PROPERTY § 496 (3d ed. 1939); 1 AMERICAN LAW OF PROPERTY § 5.22 (Casner ed. 1952). See *Boykin v. Springs*, 66 S. C. 362, 44 S. E. 934 (1903).

The most common estate of inheritance is the fee simple absolute, which is the usual ownership of land. However, there are certain other estates of inheritance in which a widow is entitled to dower. One of these, known as the fee simple conditional,¹⁴⁶ can be inherited only by children or other issue (descendants) of the deceased owner; that is, if the owner dies without issue, his brothers and sisters cannot inherit the land, because they are not issue of the owner. If the husband had issue, it seems that his widow is entitled to dower in land he owned in fee simple conditional (regardless of whether or not the issue survives the husband),¹⁴⁷ unless the land was conveyed to the husband and his issue by a wife other than his widow.¹⁴⁸ (For example, to John and the heirs of his body by his wife, Mary. Although Mary will be entitled to dower if she survives John, if Mary dies and John thereafter marries Jane, Jane will not be entitled to dower at John's death.) Furthermore even though no issue was born to the husband, it may be that his widow likewise is entitled to dower.¹⁴⁹

Another estate of inheritance in which the widow has dower is the fee simple subject to an executory interest. An example of this would be a gift of land by deed or will to John and his heirs, but if John dies without issue living at the time of his death, to Henry and his heirs. John has an estate in which his wife is entitled to dower, regardless of whether or not he has issue living at the time of his death.¹⁵⁰

146. For a detailed consideration of the fee simple conditional estate in South Carolina, see Annot., 114 A. L. R. 602 (1938).

147. For a detailed discussion, see 1 AMERICAN LAW OF PROPERTY § 5.27, at 678-79 (Casner ed. 1952), which cites early English authority in accord with the text statement. *Milledge v. Lamar*, 4 Desaus. Eq. 617, 638 (S. C. 1816), seems in accord, apparently by dictum rather than decision. And see *Wright v. Herron*, 5 Rich. Eq. 441, 446 (S. C. 1853). Also, statements in *Withers v. Jenkins*, 14 S. C. 597, 615 (1881), relative to the allowance of curtesy in land held in fee simple conditional, support the text by parity of reasoning. *But see* RESTATEMENT, PROPERTY § 75 (1936), and 2 POWELL, REAL PROPERTY § 215, at 151 (1950), to the effect that the widow should be allowed dower only if the issue survive the husband, and that if the issue subsequently die, the widow's dower then should terminate.

148. 1 AMERICAN LAW OF PROPERTY § 5.22 (1952); 2 POWELL, REAL PROPERTY § 212, at 134 (1950); RESTATEMENT, PROPERTY § 75, comment b (1936). *But see* CHALLIS, REAL PROPERTY at 265 (Sweet's ed.) as quoted in AIGLER, BIGELOW & POWELL, CASES ON PROPERTY at 732 (2d ed. 1951) to the effect that birth of issue by the first wife had the effect of enlarging the possible course of descent so as to include issue by a second wife. Query as to whether the second wife would be allowed dower in such case.

149. A dictum in *Milledge v. Lamar*, 4 Desaus. Eq. 617, 638 (S. C. 1816) would seem so to indicate. *But see* contrary English authority cited in 1 AMERICAN LAW OF PROPERTY § 5.27, at 678 (Casner ed. 1952).

150. Spann v. Carson, 123 S. C. 371, 383, 116 S. E. 427 (1923). *Milledge v. Lamar*, 4 Desaus. Eq. 617, 639 (S. C. 1817). See *Withers v. Jenkins*, 14 S. C. 597, 615 (1881). See, however, RESTATEMENT, PROPERTY § 54, Vol. I

Still another estate of inheritance in which the widow has dower is the fee simple determinable. An example would be a conveyance of land to John and his heirs so long as liquor is not sold on the land (or some other specified event which will terminate the estate). However, if thereafter liquor is sold on the land either before or after John's death, the dower interest of his wife will be defeated.¹⁵¹

Related to the fee simple determinable is the fee simple on a condition subsequent. An example would be a conveyance of land to John and his heirs upon condition that the land not be used for the sale of liquor, and if the land ever be so used then the grantor (person making the conveyance) and his heirs may re-enter as of their former estate. At John's death his widow will be entitled to dower, unless, either before or after John's death, the grantor re-enters for violation of the condition against the sale of liquor.¹⁵²

However, to entitle a wife to dower her husband not only must own an estate of inheritance; he also must be seised of an estate of inheritance.¹⁵³ A person is seised of land when he owns a present legal freehold (either a life estate or an estate of inheritance) in the land.¹⁵⁴ For example, land is conveyed to Henry for his life, and at Henry's death to John in fee simple. The present freehold is in Henry, who therefore is seised of the land, but Henry's wife has no dower because her husband owns only a life estate. Although John has an estate of inheritance in remainder, he will not be seised of the land until the termination of Henry's estate. Therefore, if John dies during the life of Henry, John's widow will not be entitled to dower since John was not seised of the land (did not have the present estate of freehold) at the time of his death.¹⁵⁵ Nor will John's widow become entitled to dower when

Appendix at 5-11 (1936). For a detailed analysis see 1 AMERICAN LAW OF PROPERTY § 5.29 (Casner ed. 1952). But if the husband's estate is subject to the exercise of a power of appointment, the wife's dower will be defeated by its exercise. See *Peay v. Peay*, 2 Rich. Eq. 409 (S. C. 1844), 1 AMERICAN LAW OF PROPERTY § 5.29 (Casner ed. 1952).

151. *Moriarta v. McRea*, 45 Hun. 564 (N. Y. 1887), *aff'd*, 120 N. Y. 659 (1890). See *Withers v. Jenkins*, 14 S. C. 597, 615 (1881); 1 AMERICAN LAW OF PROPERTY § 5.28 (Casner ed. 1952).

152. 1 AMERICAN LAW OF PROPERTY § 5.28 (Casner ed. 1952); 2 TIFFANY, REAL PROPERTY § 509 (3d ed. 1939).

153. *Spann v. Carson*, 123 S. C. 370, 116 S. E. 427 (1923); *Boykin v. Springs*, 66 S. C. 362, 44 S. E. 934 (1903).

154. See generally 2 TIFFANY, REAL PROPERTY § 501 (3d ed. 1939); Annot., 21 A. L. R. 1073 (1922).

155. 2 TIFFANY, REAL PROPERTY § 501 (3d ed. 1939); note, however, that if the particular estate is a term of years, dower will attach. *Ibid*; 1 AMERICAN LAW OF PROPERTY § 5.16 (Casner ed. 1952).

the life tenant dies after the husband, since whether or not a widow is entitled to dower is determined at the time of her husband's death.¹⁵⁶

The requirement that the husband must have been seised of land also prevents the widow from having dower in lands in which her husband owned an equitable rather than a legal estate of inheritance.¹⁵⁷ For example, land is conveyed to a trustee to pay the income to Henry for 10 years, and then the trustee shall convey the land to John in fee simple. Subject to the equitable term of years in Henry, John has a present estate of inheritance in the land. However, John's fee simple estate is equitable only, since the legal title and the seisin is in the trustee until such time as he conveys to John at the end of ten years.¹⁵⁸ Therefore, if John dies within ten years his widow will not have dower because her husband was not seised of the land during his life. Another example would be if John, under a contract to purchase, pays part of the purchase price of land and goes into possession thereof, but thereafter dies before the seller executes a deed conveying legal title to him. In such a case John's widow will not have dower because her husband during his life had only an equitable interest.¹⁵⁹ Further examples of equitable interests are not given, since an understanding of them necessitates more than a layman's knowledge of law.

Where land is owned by a partnership, the wife of a partner has no dower in such land.¹⁶⁰

2. Protection of Inchoate Dower

During her husband's life the wife's dower interest is said to be inchoate (meaning incipient, or incomplete); it is only upon the husband's death that the interest is perfected and becomes dower consummate.¹⁶¹ Nevertheless, inchoate dower

156. 1 AMERICAN LAW OF PROPERTY § 5.1, at 616 (Casner ed. 1952).

157. See *Spann v. Carson*, 123 S. C. 371, 116 S. E. 427 (1923); *Boykin v. Springs*, 66 S. C. 362, 44 S. E. 934 (1903); *Milledge v. Lamar*, 4 Desaus Eq. 617 (1817). See generally Karesh, *Devolution of Interests in Trust Estates*, 1 S. C. L. Q. 367, 381 (1949); RESTATEMENT, TRUSTS § 144 (2d ed. 1959). In many states the rule has been changed by statute or decision. See 1 AMERICAN LAW OF PROPERTY § 5.23 (Casner ed. 1952).

158. See *Linder v. Nicholson Bank & Trust Co.*, 170 S. C. 373, 170 S. E. 429 (1932).

159. *Morgan v. Wright*, 25 S. C. 601 (1886). Many courts allow dower if the husband paid the entire purchase price. Annot., 66 A. L. R. 65 (1930). *Bowman v. Bailey*, 20 S. C. 550 (1883), seems a holding to the contrary.

160. CODE OF LAWS OF SOUTH CAROLINA § 52.52 (2) (e) (1952). See Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina*, 4 S. C. L. Q. 64, 89 (1951).

161. AMERICAN LAW OF PROPERTY §§ 5.1, 5.31 (Casner ed. 1952).

is an interest which the law affords substantial protection.¹⁶² Thus, if the husband conveys or mortgages his land without the written consent of his wife in the form prescribed for her renunciation of dower, the wife nevertheless can claim dower upon her husband's death.¹⁶³ Moreover, if a transferee of the husband is so dealing with the land as to substantially lessen its value (for example, by selling off the timber, or removing mineral deposits), the court will act to protect the wife's inchoate dower.¹⁶⁴ However, if the husband has contracted to sell his land and the wife refuses to renounce her claim of dower, the purchaser can sue and have the court transfer the wife's dower from the land to the money paid therefor.¹⁶⁵

3. Claims Paramount to Dower

Despite the fact that the law so highly favors dower, certain interests prevail over the wife's dower claim. Thus if the husband's land is sold for nonpayment of taxes¹⁶⁶ or because of his failure to pay an improvement assessment (for example, one for paving),¹⁶⁷ the wife's dower in the land is extinguished. Furthermore, if during the husband's lifetime the land is condemned by an exercise of the right of eminent domain (for example, taken by court order for the construction of a state highway), the wife is barred of dower both in the land and in the award paid her husband.¹⁶⁸ In like manner, if land owned by the husband as tenant in common with another is sold for partition under a court decree, the wife's dower is barred in the proceeds of sale as well as in the land.¹⁶⁹ However, if the land is divided among the tenants in common rather than sold, the dower interest attaches to the portion of the land assigned the husband, even though it is barred in those portions assigned the other tenants in common.¹⁷⁰

162. See *Shelton v. Shelton*, 225 S. C. 502, 83 S. E. 2d 176 (1954) and the cases therein cited. See generally 1 AMERICAN LAW OF PROPERTY § 5.32 (Casner ed. 1952).

163. CODE OF LAWS OF SOUTH CAROLINA § 19-115 (1952); *Watkins v. Justice*, 112 S. C. 329, 98 S. E. 193 (1910); *Avant v. Robertson*, 2 McMUL. 215 (S. C. 1842).

164. *Alabama Vermiculite Co. v. Patterson*, 149 F. Supp. 534 (W. D. S. C. 1955); *Brown v. Brown*, 94 S. C. 492, 78 S. E. 447 (1913). See 1 AMERICAN LAW OF PROPERTY § 5.32, at 695 (Casner ed. 1952).

165. *Holly Hill Lumber Co. v. McCoy*, 205 S. C. 60, 30 S. E. 2d 856 (1944), *cert. denied*, 323 U. S. 777 (1944).

166. CODE OF LAWS OF SOUTH CAROLINA § 19-129 (1952).

167. *Town of Cheraw v. Turnage*, 184 S. C. 76, 91, 191 S. E. 831 (1937) (The Court stated dower would continue in any surplus proceeds of sale).

168. *Shelton v. Shelton*, 225 S. C. 502, 83 S. E. 2d 176 (1954).

169. *Holley v. Glover*, 36 S. C. 404, 15 S. E. 605 (1892).

170. *Gaffney v. Jefferies*, 59 S. C. 565, 38 S. E. 216 (1901).

Mortgages and other liens which existed before the husband's marriage,¹⁷¹ or before he acquired the land,¹⁷² are paramount to dower, as, after marriage, are purchase money mortgages¹⁷³ (even though the wife did not renounce dower) and other mortgages on which dower was renounced.¹⁷⁴ Should a mortgage which is paramount to dower be foreclosed during the husband's life, dower is extinguished in any surplus proceeds of sale as well as in the land itself.¹⁷⁵ On the other hand, if the foreclosure is after the husband's death, the wife is entitled to dower in any such surplus proceeds.¹⁷⁶

4. How Dower May Be Barred

The usual method of barring dower when the husband is conveying or mortgaging his land is to have the wife renounce her dower in the manner provided by statute.¹⁷⁷ In this connection, it is worth noting that the statute expressly provides that a minor wife (one under 21 years of age) may thus renounce her dower;¹⁷⁸ also, that a special procedure is provided whereby the husband may convey land free of the dower of an insane wife.¹⁷⁹ In addition, a contract not to claim dower made by an adult wife (at least 21 years old) with her husband is valid if in writing, clear in its terms, and made for valuable consideration.¹⁸⁰ Also, it seems that a contract not to claim dower made before marriage by an adult woman is valid.¹⁸¹

The South Carolina statutes provide for forfeiture of dower if the wife commits adultery (certain necessary circumstances are specified),¹⁸² or obtains either a valid or invalid divorce

171. *Jones v. Miller*, 17 S. C. 380 (1802).

172. 2 *TIFFANY REAL PROPERTY* § 511 (3d ed. 1939). See *Shelton v. Shelton*, 225 S. C. 502, 83 S. E. 2d 176 (1954).

173. Among other cases, see *Evans v. Pegues*, 102 S. C. 186, 86 S. E. 480 (1915).

174. *Grube v. Lilienthal*, 51 S. C. 442, 29 S. E. 230 (1898).

175. *Grube v. Lilienthal*, 51 S. C. 442, 29 S. E. 230 (1898). See Annot., 65 A. L. R. 963, 965 (1930).

176. *Duncan v. Johnson*, 123 F. 2d 392 (4th Cir. 1941); *Ex parte Clark*, 130 S. C. 501, 126 S. E. 137 (1925).

177. CODE OF LAWS OF SOUTH CAROLINA §§ 19-111 thru 114 (1952).

178. CODE OF LAWS OF SOUTH CAROLINA §§ 19-112, 113 (1952).

179. CODE OF LAWS OF SOUTH CAROLINA §§ 19-141 thru 146 (1952), as amended.

180. See *Harley v. Orvin*, 197 S. C. 138, 14 S. E. 2d 701 (1941); *Tuten v. Almeda Farms*, 184 S. C. 195, 192 S. E. 153 (1937); Annot., 49 A. L. R. 116 (1927). *Smith v. Oglesby*, 33 S. C. 194, 11 S. E. 687 (1890) held the wife's dower to be barred by her contract made with a third person.

181. *Gelzer v. Gelzer*, Bail. Eq. 387 (S. C. 1831). But see *Spiva v. Jeter*, 9 Rich. Eq. 434 (S. C. 1857), wherein the wife was allowed dower in spite of such a contract because husband had not performed his marital duties.

182. CODE OF LAWS OF SOUTH CAROLINA § 19-121 (a), (c) (1952).

from her husband,¹⁸³ or marries another during the life of her husband.¹⁸⁴ Also, if the wife without just cause deserts her husband for a year or more the husband may sue to bar dower.¹⁸⁵ Likewise, if the husband obtains a valid divorce the dower of his former wife is barred.¹⁸⁶

5. Election Between Dower and a Distributive Share

The widow's interest in her husband's wealth as heir (should he die without a will) or devisee (should he die will- ing property to her) is subject both to the husband's debts and to claims against his estate.¹⁸⁷ Thus if these debts and claims exceed the value of the estate, the widow as heir or devisee takes nothing, except to the extent of her homestead claim.¹⁸⁸ On the other hand, dower is paramount to the debts of the husband as well as to claims against his estate.¹⁸⁹ Since the widow of a man who died intestate (without a will) can- not take dower as well as a distributive share as heir of her husband, she must elect whether to claim dower or to take as heir.¹⁹⁰

If the debts of a man dying intestate exceed or are a large part of the value of his estate, it may be to his wife's advan- tage to claim dower instead of as heir. For example, suppose that the husband dies intestate, leaving a widow and one child, and \$30,000 in assets, consisting of land worth \$18,000, and stocks, bonds, moneys and household goods totalling \$12,000. Since debts and claims against the estate amount to \$2,000, the estate has a net value of \$28,000. As heir the widow is entitled to one half of both the land and other wealth;¹⁹¹ the dower in- terest is only one third of the land for life (or one sixth the value of the land if paid her in money), and no interest in

183. CODE OF LAWS OF SOUTH CAROLINA § 19-121 (b) (1952).

184. CODE OF LAWS OF SOUTH CAROLINA § 19-122 (1952).

185. CODE OF LAWS OF SOUTH CAROLINA §§ 19-123 thru 128 (1952).

186. CODE OF LAWS OF SOUTH CAROLINA § 20-118, as amended, 48 Stat. 318 (1953). See Summer, *The South Carolina Divorce Act of 1949*, 3 S. C. L. Q. 253, 294 (1951). Even before enactment of the statute (1949), a valid foreign divorce barred dower in South Carolina land. *Dawson v. Torre*, 116 S. C. 338, 108 S. E. 101 (1921). See Annot., 168 A. L. R. 793 (1947).

187. CODE OF LAWS OF SOUTH CAROLINA § 19-476 (1952); ATKINSON, *WILLS* 100 (2d ed. 1953).

188. See p. 508 *supra*.

189. See note 141 *supra*.

190. CODE OF LAWS OF SOUTH CAROLINA §§ 19-57, 151 (1952); *Lavender v. Daniel*, 58 S. C. 125, 36 S. E. 546 (1900); *Evans v. Pierson*, 9 Rich. 9 (S. C. 1885); *Avant v. Robertson*, 2 McMul. 215 (S. C. 1842). See also *Foster, Widow's Election Between Dower and Other Benefits*, 9 S. C. L. Q. 277 (1957).

191. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952).

the husband's wealth consisting of things other than land owned in fee simple.¹⁹² Therefore, as heir the widow's interest would be worth not more than a life interest in one third of the land, or \$3,000, one sixth the value of the land in money. In this situation, obviously it would be to the widow's interest to accept a distributive share as heir. On the other hand, suppose that debts and claims against the estate amounted to \$28,000, and the net value, therefore, was only \$2,000. In such case the widow would profit by claiming dower, since despite the claims against the estate she still would be entitled to her life interest in one third of the land, or \$3,000 (one sixth the value of the land) in money.

6. Election Between Dower and Testamentary Provisions

If the husband dies testate (with a will), his widow may claim dower in addition to accepting any gifts given her in the will, unless the will provides that she is not to have both.¹⁹³ Should the will so provide (either expressly or by necessary implication), she then must decide whether or not to waive dower and take the gift provided in the will.¹⁹⁴ In determining which course will be to her advantage, the amount of the creditors' claims must be considered, since these claims must be satisfied before any gift made by the will can be paid. On the other hand, as already has been discussed, dower is superior to debts of the husband and to the claims against his estate.¹⁹⁵

However, even though the net value of the estate greatly exceeds the sum of the debts and claims against it, it may be that the widow nevertheless will prefer to take dower instead of the gift made her by the will. For example, suppose that at his death the husband owns land worth \$45,000, as well as other assets worth \$15,000, and that claims against his estate are in amount \$3,000. Suppose further that a gift of \$2,500 made in the will provides that it is in lieu of dower. Since her dower in this case would be worth \$7500 (one sixth the value of the land), the widow would do well to take dower instead of the gift made in the will.

192. See p. 513 *supra*.

193. See *Bomar v. Wilkins*, 154 S. C. 64, 151 S. E. 110, 68 A. L. R. 501 (1929). See 9 S. C. L. Q. 277 (1959) for a detailed discussion.

194. *Ibid*.

195. See note 141 *supra*.

B. *No Marital Interest in the Husband*

Under present day South Carolina law a husband has no marital interest in the property of his wife.¹⁹⁶ By this is meant that during her lifetime he has no control over property owned by her, and at her death by her will she may wholly exclude him from any share in her decedent estate (the property she owns at her death). However, if she dies intestate (without a will), her husband as an heir is entitled to a portion of her decedent estate.¹⁹⁷

V. INTER VIVOS TRANSFERS OF PROPERTY

Transfers of interests in wealth may be made as sales (for value) or as gifts. If a transfer is a sale, the seller is known as the vendor and the buyer as the vendee. If a transfer is made as a gift, the person making the gift is the donor, and the person receiving the same is the donee. Transfers made by an owner during his life are known as inter vivos (between the living), as distinguished from those operating at the owner's death, either pursuant to a will (testamentary) or by virtue of the statute of descent and distribution (inheritance).

Not infrequently an owner of wealth desires during his life to make an immediate gift to someone, who usually is a member of the owner's family. Of course, such owner must be of sound mind and at least 21 years of age.¹⁹⁸ If he is not, he later may be able to reclaim the thing he gave. Also, at the time he makes the gift he must have sufficient remaining assets to pay the claims of his then existing creditors, nor must the transfer be intended as a scheme to defeat the claims of creditors he thereafter may acquire; otherwise the creditors may be able to seize the subject of the gift for payment of their claims.¹⁹⁹ Assuming that these necessary qualifications exist, however, the further question remains as to how the intended gift is to be accomplished.

A. *Gifts of Land*

If the subject of the gift is land, the transfer must be made by a written instrument called a deed, which should be prepared by the donor's lawyer and signed by the donor pursuant

196. S. C. CONST. art. 17, § 9 (1895); CODE OF LAWS OF SOUTH CAROLINA §§ 20-201 thru 204, § 19-101 (1952).

197. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952).

198. 24 AM. JUR. *Gifts* §§ 16, 17; BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 239 (2d ed. 1954).

199. CODE OF LAWS OF SOUTH CAROLINA § 57-301 (1952).

to the lawyer's instructions.²⁰⁰ When delivered by the donor (which means that he has evidenced his intention to make the deed immediately operative), the deed transfers the intended interest in the land.²⁰¹

Unless the above procedure is followed, in most instances the donor will not have accomplished his intention to make the gift. For example, suppose that an owner of land, intending to make a gift of it to his son, merely places the son in possession without delivering a deed to him. In such a case ownership remains in the father, who can thereafter convey or mortgage it free of any claims of the son. Moreover, since the land still belongs to the father, it can be reached by the father's creditors for payment of his debts. Furthermore, at the father's death the land will pass as part of his estate, either to his devisee if he left a will disposing of the land, or to his heirs in the event that he left no such will. Correspondingly, since the son did not acquire legal title, he will be unable to convey or mortgage the land, nor can he dispose of it at his death.²⁰²

It is true that occasionally a possessor of land to whom a gift was intended prevails against the donor or his heirs or devisee, despite the fact that there has been no compliance with the legal formalities necessary to accomplish the transfer. Sometimes this is because the possessor, in reliance upon the strength of the gift, has made valuable improvements on the land.²⁰³ In such a case the donor, or his heir or devisee should the donor be dead, is said to be estopped (forbidden) to deny the validity of the gift. Sometimes, even though no such improvements have been made, if the possessor has maintained his possession for ten years, claiming the land as his own, he will have acquired title by adverse possession, and thereafter cannot be ousted by the donor or persons claiming under him.²⁰⁴ Moreover, on one occasion the South Carolina court protected a person claiming land under a deceased donee, the deed to whom had been prepared improperly by a layman.

200. See CODE OF LAWS OF SOUTH CAROLINA § 57-251 (1952) for the form of deed ordinarily used in South Carolina.

201. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 244 (2d ed. 1954).

202. For an example of an ineffective alleged oral gift of land, see *Knight v. Stroud*, 214 S. C. 437, 53 S. E. 2d 72 (1949), noted 2 S. C. L. Q. 185 (1949).

203. *Ibid.*

204. *Harrelson v. Reaves*, 219 S. C. 394, 65 S. E. 2d 478 (1951), noted in 4 S. C. L. Q. 320 (1951); *Brevard v. Fortune*, 221 S. C. 117, 69 S. E. 2d 355 (1952).

The court did this by reforming the deed so that it would accomplish the unmistakable intent of the donor, also deceased.²⁰⁵ However, on other occasions the court has refused to protect donees claiming under defective deeds.²⁰⁶

B. Gifts of Personal Property

Gifts of interests in things other than land made during the donor's life are said to be either *inter vivos* (among the living) or *causa mortis* (because of death).²⁰⁷ A gift *causa mortis*, sometimes referred to as a deathbed gift, is one made by a donor in contemplation of his impending death from a present infirmity.²⁰⁸ During the donor's lifetime he can revoke the gift,²⁰⁹ and if he recovers from his illness, or if the donee dies first, the gift is automatically revoked.²¹⁰ On the other hand, a gift *inter vivos* which is the usual gift made by one person to another, is irrevocable once it has been made.²¹¹

While a written instrument may be used to make a gift,²¹² in many cases both *causa mortis* and *inter vivos* gifts can be made without a writing. Thus gifts of such things as jewelry, silver table-ware, family portraits, money in hand, books, etc., can be made by delivering them to the donee with the intention of making a gift thereof.²¹³

In the law of gifts a thing is delivered when the possession of it has been transferred from one person to another.²¹⁴ Ordinarily a delivery is made by physically handing the thing either to the donee, or to someone on the donee's behalf.²¹⁵ However, if the subject matter of the gift already is in possession of the donee, the donor completes the gift merely by manifesting his intention to do so.²¹⁶ If the thing to be given is in-

205. *Lawrence v. Clark*, 115 S. C. 67, 104 S. E. 330 (1920) (words of inheritance added to allow passage of fee). See Means, *Words of Inheritance in Deeds of Land in South Carolina*, 5 S. C. L. Q. 359 (1953).

206. Among the many cases are *Gowdy v. Kelley*, 185 S. C. 415, 194 S. E. 156 (1937); *Groce v. Benson*, 168 S. C. 145, 167 S. E. 151 (1933).

207. BROWN, *PERSONAL PROPERTY* § 37 (2d ed. 1955).

208. *Id.* § 51. If so intended, a gift may be an *inter vivos* one, even though made by a donor *in extremis*. *Ibid.*

209. *Id.* § 55.

210. *Ibid.*

211. BROWN, *PERSONAL PROPERTY* § 38 (2d ed. 1955).

212. *Id.* § 46.

213. BROWN, *PERSONAL PROPERTY* § 38 (2d ed. 1955).

214. *Id.* § 39. See Coleman & Bernstein, *What Constitutes a Sufficient Delivery of a Gift in South Carolina*, 6 SELDEN SOCIETY YEARBOOK 54 (1942).

215. BROWN, *PERSONAL PROPERTY* §§ 38, 40 (2d ed. 1955).

216. *Esswein v. Seigling*, 2 Hill Eq. 600 (S. C. 1837); BROWN, *PERSONAL PROPERTY* § 44 (2d ed. 1955).

capable of manual delivery, either because of its bulk (*e.g.*, cattle or farm machinery) or because it is not physically present (*e.g.*, jewelry in a bank lock box), it is wise to make a written gift, though under some circumstances one made without a writing is valid.²¹⁷

Gifts of things having no physical substance which can be delivered, can be made only by means of a written instrument.²¹⁸ Common examples of such items include simple debts not represented by a writing, and checking accounts in banks. However, gifts of certain obligations represented by writings which must be presented in order to secure payment, can be made merely by delivery of the writing.²¹⁹ Examples of obligations of this type are building and loan accounts, and savings accounts represented by pass books or certificates of deposit,²²⁰ promissory notes other than those made by the donor,²²¹ and certificates of stock.²²² However, gifts of United States Savings Bonds cannot be made merely by delivery of the bonds, since applicable government regulations forbid their transfer.²²³ Furthermore, it is worth noting that a gift by a donor of his own promissory note or check is not enforceable by the donee against the donor or his estate.²²⁴ In such cases, the gift is completed only when the note has been paid by the donor, or the check paid by the bank during the donor's lifetime.²²⁵

In most instances a person wishing to make a gift of substantial value will be well advised to consult a lawyer as to the proper method of making the gift. This is true even though the thing is of a kind which can be given by mere delivery, unless it is something of relatively little value. Where there is no written instrument signed by the donor, the donee may have difficulty in establishing his claim of gift. For example,

217. BROWN, PERSONAL PROPERTY §§ 41, 42 (2d ed. 1955).

218. *Id.* § 61.

219. *Id.* §§ 59, 60.

220. *Le Roy v. Lanford*, 166 S. C. 221, 164 S. E. 634 (1932); BROWN, PERSONAL PROPERTY § 60 (2d ed. 1955).

221. BROWN, PERSONAL PROPERTY § 59 (2d ed. 1955). See Annot., 25 A. L. R. 642 (1923).

222. BROWN, PERSONAL PROPERTY § 60 (2d ed. 1955); CODE OF LAWS OF SOUTH CAROLINA §§ 12-306, 314 (1952).

223. BROWN, PERSONAL PROPERTY § 59 (2d ed. 1955); Annot., 40 A. L. R. 2d 788 (1955). Some cases have sustained *causa mortis* gifts of savings bonds registered in the name of the donor solely. *Ibid.*

224. BROWN, PERSONAL PROPERTY § 59 (2d ed. 1955). See cases cited note 26 *supra*; Annot., 38 A. L. R. 2d 594 (1954). See also *Hall v. Howard*, Rice 310 (S. C. 1839).

225. *Sharpe v. Sharpe*, 105 S. C. 459, 90 S. E. 34 (1916).

after the donor's death his next of kin may claim that no gift was made, on the ground either that the donor's attempted delivery was legally insufficient, or that the thing was delivered as a loan rather than as a gift. Furthermore, a South Carolina statute provides that no parol gift (one made without a written instrument) shall be valid against the claims of later creditors of the donor, or purchasers or mortgagees from him "... except where the donee shall live separate and apart from the donor and actual possession shall, at the time of the gift, be delivered to and remain and continue in the donee, his executors, administrators or assigns."²²⁶

VI. SUCCESSION TO DECEDENT ESTATES

A person who dies without a will is said to die intestate, and is referred to as an intestate.²²⁷ A person who dies leaving a legally sufficient will is said to die testate, and is called a testator (testatrix is sometimes used if the decedent is a woman).²²⁸ The property which a person owns at his death (called his decedent estate) first must be applied to payment of his debts and the claims for which his decedent estate is liable.²²⁹ After payment of these debts and claims, any remaining property passes by succession, either to his heirs should he die intestate, or to the persons named in his will should he die testate.²³⁰ Should a will not effectually dispose of all of a decedent's property there is a partial intestacy, and the undisposed of property is considered intestate property.²³¹

A. Intestate Succession

1. Property Subject

If otherwise eligible, equitable as well as legal interests are subject to intestate succession.²³² All estates of inheritance in land are so subject,²³³ though in the case of the fee simple

226. CODE OF LAWS OF SOUTH CAROLINA § 57-307 (1952).

227. ATKINSON, WILLS § 1 (2d ed. 1953).

228. *Ibid.*

229. CODE OF LAWS OF SOUTH CAROLINA § 19-476 (1952); ATKINSON, WILLS at 100 (2d ed. 1953).

230. ATKINSON, WILLS at 100 (2d ed. 1953).

231. BLACK, LAW DICTIONARY 956 (4th ed. 1951).

232. The South Carolina cases are discussed in Karesh, *Devolution of Interests in Trust Estates*, 1 S. C. L. Q. 367, 369-374 (1949). See also ATKINSON, WILLS § 27 (2d ed. 1953).

233. See *Burnett v. Burnett*, 17 S. C. 545, 551 (1882); 19 AM. JUR. *Estates* § 14 (1933). Although the title of an intestate trustee of real estate is inheritable, it descends to the eldest son as common law heir instead of to the heirs under the Statute of Descent and Distribution. *Martin v. Price*, 2 Rich. Eq. 412 (S. C. 1846). See Karesh, *Devolution of Interests in Trust Estates*, 1 S. C. L. Q. 367, 397 (1949).

conditional the succession is limited to lineal heirs.²³⁴ Life estates *per autre vie* (for another's life)²³⁵ and leaseholds in land²³⁶ are subject to intestate succession, as are most interests in land which survive the death of the owner of the interest.²³⁷ Also subject to intestate succession are interests for more than the decedent's own life in things other than land.²³⁸ Examples of such things include money, bank deposits, building and loan deposits, corporation stocks and bonds, farm machinery, livestock, household goods, etc.

Interests in certain commonly owned things are not subject to intestate succession because the decedent's interest therein terminates at his death. Examples of such things are life insurance policies on his life owned by the decedent, but payable to a named beneficiary,²³⁹ United States Savings Bonds registered to be paid either to the decedent or another, or to another on the death of the decedent,²⁴⁰ and bank and building and loan deposits which, with the intention of making a gift thereof, the decedent has made payable either to himself or another, or payable to himself or another or the survivor.²⁴¹

2. Manner of Distribution

After payment of debts and claims against an intestate's estate, the balance of his property will be disposed of in ac-

234. See *Burnett v. Burnett*, 17 S. C. 545, 551 (1882). Many South Carolina cases to the same effect are collected in Annot., 114 A. L. R. 602, 611 (1938). But see reference to *Blume v. Percy*, 204 S. C. 409, 29 S. E. 2d 673 (1944) in Means, *Words of Inheritance in Deeds of Land in South Carolina*, 5 S. C. L. Q. 313, 353 n. 146 (1) (1953).

235. CODE OF LAWS OF SOUTH CAROLINA § 19-70 (1952); RESTATEMENT, PROPERTY § 151 (1936).

236. *Payne v. Harris*, 3 Strob. Eq. 39 (S. C. 1849); ATKINSON, WILLS § 116 (2d ed. 1953).

237. ATKINSON, WILLS § 27 (2d ed. 1953). Reversions are descendable and devisable, *Tyson v. Weatherly*, 214 S. C. 336, 52 S. E. 2d 410 (1949), as are remainders (vested and contingent) and executory interests. See *Hicks v. Pegues*, 4 Rich. Eq. 413 (S. C. 1852). However, in South Carolina possibilities of reverter are neither descendible nor devisable, but pass by representation to the heirs of the grantor determined as of the time of the expiration of the estate granted. Among other cases see *Purvis v. McElveen*, 234 S. C. 94, 106 S. E. 2d 913 (1959). See also Annot., 77 A. L. R. 344 (1932). The same is true of a right of entry for breach of condition. *Uppington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359 (1896).

238. ATKINSON, WILLS § 101 (2d ed. 1953).

239. *Wannamaker v. Stroman*, 167 S. C. 484, 166 S. E. 621 (1932). But where the policy prescribes no particular method of changing the beneficiary, a change by will is valid. *Hunter v. Hunter*, 100 S. C. 517, 84 S. E. 180 (1915). See Annot., 62 A. L. R. 940 (1929); Annot., 25 A. L. R. 2d 999 (1952).

240. ATKINSON, WILLS § 40 (2d ed. 1953).

241. *Hawkins v. Thackston*, 224 S. C. 445, 79 S. E. 2d 714 (1954). See note 35 *supra*; ATKINSON, WILLS § 40 (2d ed. 1953).

cordance with the provisions of the statute of descent and distribution.²⁴² In general, the method of distribution provided by the statute is as below set out. In case the intestate is a woman instead of a man, the provision for the husband is the same as that for the widow.²⁴³

(1) If the intestate leaves a widow and two or more children (a legally adopted child takes as a natural child),²⁴⁴ the widow takes one third, and the children the other two thirds of the intestate's wealth. Any children of a deceased child of the intestate take the share of the intestate's estate which their parent would have taken.²⁴⁵

(2) If the intestate leaves a widow and only one child, the widow takes one half, and the child the other half.²⁴⁶

(3) If the intestate leaves a widow but no child or more remote descendant, the widow takes one half, and the intestate's father, mother, and brothers and sisters, or such of them as are live, the other half.²⁴⁷ The children of a deceased full brother or sister of the intestate take the share which their parent would have taken had he survived the intestate.²⁴⁸ The father, mother, and full brothers and sisters exclude any half brothers or sisters.²⁴⁹ However, if the intestate leaves no father, mother, or full brothers or sisters, but only nieces and nephews who are children of full brothers or sisters, half brothers and sisters share with these nieces and nephews.²⁵⁰ If the intestate was a legally adopted child, his adopting parents inherit from him instead of his natural parents.²⁵¹ Also, the natural children of the intestate's adopting parents inherit from him as though they were his natural brothers and sisters.²⁵² In like manner, other children adopted by the same adopting parents inherit from him.²⁵³

242. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952).

243. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (8) (1952).

244. CODE OF LAWS OF SOUTH CAROLINA § 19-52.11 (1952), as enacted, 48 Stat. 1763 (1954).

245. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1) (1952).

246. *Ibid.*

247. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (2) (1952).

248. *Ibid.*

249. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (3) (1952). A child of the whole blood excludes children of the halfblood. *Bynum v. Bynum*, 236 S. C. 185, 113 S. E. 2d 748 (1960).

250. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (4) (1952).

251. CODE OF LAWS OF SOUTH CAROLINA § 19-52.11 (1952), as enacted, 48 Stat. 1763 (1954). See Karesh, *Annual Survey of Wills*, 7 S. C. L. Q. 196, 203 (1954).

252. *Ibid.*

253. *Ibid.*

(4) If the intestate leaves no descendants, father, mother, full brothers or sisters or their children, or half brothers or sisters, or grandparent or other lineal ancestor, the widow takes the entire estate.²⁵⁴ If there be no widow the estate goes to the uncles and aunts and the children of any deceased uncle or aunt.²⁵⁵ Should there be no uncles or aunts or children of a deceased uncle or aunt, the next of kin (the next closest blood relative) takes the entire estate.²⁵⁶

(5) Should the intestate not leave a widow or blood relative, the estate will be taken by any stepchild or step children of the intestate.²⁵⁷

(6) Should the intestate not leave a widow, blood relative, or stepchild, his real and personal property escheats (reverts) to the State.²⁵⁸

3. Inheritance By or From Illegitimate Children.²⁵⁹

Illegitimate children are regarded as heirs of their mother for purposes of intestate succession to property owned by the mother or, under some circumstances, by her blood relatives.²⁶⁰ In like manner, the mother, and in some cases her blood relatives, are heirs of the illegitimate child for purposes of succession to intestate property of the illegitimate.²⁶¹ Illegitimate children of the same mother inherit from each other, as do all children of the mother, both legitimate and illegitimate.²⁶² The illegitimate child cannot inherit from his father, nor can his father inherit from him. Furthermore, unless they are children of the same mother, an illegitimate child cannot inherit from either a legitimate or an illegitimate child of the same father.²⁶³

B. *Testate Succession*

A testamentary gift (one made by will) of land is called a devise, and the person receiving the gift is a devisee.²⁶⁴ A

254. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (6) (1952).

255. *Ibid.*

256. *Ibid.*

257. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (10) (1952), as amended, 49 Stat. 309 (1955).

258. S. C. CONST. art. 14, § 3 (1895); CODE OF LAWS OF SOUTH CAROLINA § 57-5 (1952).

259. See Bernstein, *Illegitimates and Inheritance*, 7 SELDEN SOCIETY YEARBOOK at 26 (1943), for a detailed consideration of the matter.

260. CODE OF LAWS OF SOUTH CAROLINA § 19-53 (1952).

261. *Ibid.*

262. *Ibid.* See Muldrow v. Caldwell, 173 S. C. 243, 175 S. E. 501 (1934).

263. ATKINSON, WILLS § 22 (2d ed. 1953).

264. BLACK, LAW DICTIONARY at 539 (4th ed. 1951).

testamentary gift of personal property is a bequest, or a legacy, and the recipient is a legatee.²⁶⁵

Generally speaking and subject to some exceptions,²⁶⁶ a person by will may dispose of his property in the manner he sees fit (even to the extent of wholly excluding one or all of his heirs), rather than have it pass as intestate property under the statute of descent and distribution.²⁶⁷ The disposition provided by the statute is rigid and designed to fit the average case; necessarily it makes no provisions for the special situations which exist in nearly every family unit. For this reason, it usually is desirable for an owner of wealth to dispose of the same by will, rather than have it pass as intestate property.

1. Property Subject to Testamentary Disposition

Just as both legal and equitable interests are subject to intestate succession, they likewise are subject to testamentary disposition.²⁶⁸ With the exception of the estate in fee simple conditional,²⁶⁹ all estates of inheritance in land may be devised.²⁷⁰ Both life estates *per autre vie*²⁷¹ (for another's life) and leaseholds in land²⁷² are subject to testamentary disposition, as are most other interests in land.^{272a} Also subject to testamentary disposition are interests for more than the testator's life in things other than land. Examples of such things are money, bank deposits, savings and loan deposits, corporate stocks, bonds, farm machinery, live stock, household goods, etc. However, just as certain interests in things other than land are not subject to intestate succession, in like manner they are incapable of disposition by will. An example of such an interest is a life insurance policy on the life of the decedent, which was owned by him but which is payable to a beneficiary other

265. *Id.* at 1037, 1043.

266. See page 530 *infra*.

267. CODE OF LAWS OF SOUTH CAROLINA § 19-201 (1952); *Smith v. Whetstone*, 209 S. C. 78, 39 S. E. 2d 127 (1946). The statute of descent and distribution is CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952) and is discussed *supra* p. 527.

268. *Linder v. Nicholson Bank & Trust Co.*, 170 S. C. 373, 170 S. E. 429 (1933). See *Karesh op. cit. supra* note 232, at 375.

269. *Jones v. Postell*, Harper 92 (S. C. 1824); *Burnett v. Burnett*, 17 S. C. 545 (1882).

270. 1 TIFFANY, REAL PROPERTY §§ 25, 33 (3d ed. 1939). The fee tail does not exist in South Carolina. See *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 53, 41 S. E. 2d 393 (1947).

271. CODE OF LAWS OF SOUTH CAROLINA §§ 19-202, 708 (1952). See notes 18, 19, 20 *supra*.

272. *Payne v. Harris*, 3 Strob. Eq. 39 (S. C. 1849).

272a. *Supra* note 237.

than the decedent or his estate.²⁷³ Other examples are United States Savings Bonds registered to be paid either to the decedent or another, or payable to another on the death of decedent,²⁷⁴ and bank and savings and loan deposits which, with the intention of making a gift thereof, the decedent has made payable either to himself or another, or payable to himself or another or the survivor.²⁷⁵

2. Limitations on Testamentary Disposition

a. Dower²⁷⁶

A man by his will cannot deprive his wife of her dower interest in such of his lands as are subject to dower. However, he can provide in his will that if she elects to take dower she shall take no other interest in his testamentary estate, and thus require her to elect whether to take her dower interest in lieu of other provisions made for her.²⁷⁷ On the other hand, a woman by will may exclude her husband from any share of her estate.²⁷⁸

b. Homestead²⁷⁹

If a homestead in land was assigned during the life of the husband, any person to whom the husband wills the land takes it subject to the wife's right of homestead for her life.²⁸⁰

c. Provisions For a Mistress or Illegitimate Children

By statute a man who has a wife or legitimate children is forbidden to give by deed or will more than one fourth of his estate to his mistress or illegitimate children.²⁸¹ If he does so, the gift made in excess of one fourth share may be set aside at the election of the wife and legitimate children.²⁸²

d. Posthumous Children and Children Born or Adopted After Making of a Will

If a testator has a child born after his death (called a posthumous child), such child will be entitled to an equal share

273. See note 239 *supra*.

274. See note 240 *supra*.

275. See note 241 *supra*.

276. Discussed p. 513 *supra*.

277. See p. 520 *supra*.

278. See p. 521 *supra*.

279. Discussed p. 503 *supra*.

280. See note 132 *supra*.

281. CODE OF LAWS OF SOUTH CAROLINA § 57-310 (1952). See also § 19-238.

282. But, life insurance proceeds are not counted towards the one-fourth share, *White v. White*, 212 S. C. 440, 48 S. E. 2d 189 (1948); nor is land without the state, *Humphries v. Settlemyer*, 91 S. C. 389, 74 S. E. 892 (1912).

of any gift made in the will to the testator's other child or children.²⁸³ The same rule is applicable in the case of a child born or adopted after the making of a will, either by a man or woman.²⁸⁴ The rule will be applied even though the will expresses an intention to exclude posthumous children and children born or adopted after making of the will.²⁸⁵ However, if the maker of the will at the time either had no older child or children, or if the will makes no provision for a child, neither a posthumous child nor a child born or adopted after making of the will takes any share of the testate estate.²⁸⁶

3. Who May Make a Will

a. Age Requirement

A person may dispose of his real and personal property by will, provided he is of sound mind and not less than 21 years of age, or if married, above the age of 18 years.²⁸⁷

b. Mental Capacity

For the purpose of making a will, a person need not have the full mental capacity that is required for the execution of a deed or contract.²⁸⁸ Generally speaking, there was sufficient capacity if the testator had the ability to know the nature and extent of his property, and those persons who had a natural claim upon his bounty, as well as the persons to whom he gave it by will.²⁸⁹

c. Knowledge of Contents

For a valid will it is necessary that the testator know the contents thereof, and from the fact of its execution it is presumed that he did know the contents.²⁹⁰ However, where the testator is of doubtful capacity, or there are suspicious circumstances, the fact that he knew the contents of the will must affirmatively be proved by showing either that he read the

283. CODE OF LAWS OF SOUTH CAROLINA § 19-235 (1952). See *Marett v. Broom*, 160 S. C. 91, 158 S. E. 216 (1931).

284. CODE OF LAWS OF SOUTH CAROLINA § 19-236 (1952); *Marett v. Broom*, 160 S. C. 91, 158 S. E. 216 (1931).

285. See *Marett v. Broom*, 160 S. C. 91, 158 S. E. 216 (1931).

286. *Weinberg v. Weinberg*, 208 S. C. 157, 167, 37 S. E. 2d 507 (1946).

287. CODE OF LAWS OF SOUTH CAROLINA § 19-201 (1952), as amended, 50 Stat. 568 (1957).

288. *McCollum v. Banks*, 213 S. C. 476, 50 S. E. 2d 199 (1948); *Kirkwood v. Gordon*, 7 Rich. 474 (S. C. 1854).

289. Among the cases are *In re Washington's Estate*, 212 S. C. 379, 46 S. E. 2d 287 (1948); *Sumter Trust Co. v. Holman*, 134 S. C. 412, 132 S. E. 811 (1926); *Matheson v. Matheson*, 125 S. C. 165, 118 S. E. 312 (1923).

290. *Ex parte King*, 132 S. C. 59, 128 S. E. 850 (1925); *Ex parte McKie*, 107 S. C. 57, 91 S. E. 978 (1917).

will or that it was read to him, or that its provisions corresponded to his instructions.²⁹¹

d. Coercion, Undue Influence, Fraud

Even though a person was of sound mind when he made his will, it will be void if it was made under compulsion of threats or violence, or as a result of undue influence which took away the testator's free agency and prevented his exercise of sound judgment and choice.²⁹² However, the mere fact that the persons to whom the testator gave his property urged and influenced him to do so does not invalidate the will; undue influence means excessive and unlawful influence which prevented the testator from exercising his own choice and judgment.²⁹³ Furthermore, the burden of proof is on the one who asserts that the testator was unduly influenced, and the evidence relied upon to show it must point unmistakably and convincingly to the fact that the testator's mind was so subjected to that of another that the will is not that of the testator.²⁹⁴

Generally speaking, if the dispositions of the will were made as a result of fraud practiced upon the testator, the court will invalidate the will.²⁹⁵ Fraud is a wilful misrepresentation of material fact made to the testator and believed by him. Thus if the testator is fraudulently induced to sign a paper in the belief that it is not a will, or that the dispositions made in the will are other than those actually contained therein, the purported will is void.²⁹⁶ In like manner, if the disposition knowingly made by the testator was made as a result of false information wilfully imparted him, the will is invalid.²⁹⁷

4. Formalities

a. Will Executed in South Carolina

Under South Carolina law ordinarily²⁹⁸ a will executed within the State will not be valid unless it complies with the following requirements.

291. Among other cases, see *Hobby v. Bobo & Dean*, 12 Rich. L. 247 (S. C. 1832); *McNinch v. Charles*, 2 Rich. L. 229 (S. C. 1845).

292. *Smith v. Whetstone*, 209 S. C. 78, 39 S. E. 2d 127 (1946) discusses fully coercion and undue influence.

293. *Ibid.*; *Harris v. Berry*, 231 S. C. 201, 98 S. E. 2d 251 (1957).

294. *Smith v. Whetstone*, 209 S.C. 78, 39 S. E. 2d 127 (1946); *Anderson v. Wall*, 114 S. C. 275, 103 S. E. 562 (1920); *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049 (1910).

295. See generally ATKINSON, *WILLS* § 56 (2d ed. 1953).

296. *Ibid.*

297. *Ibid.*

298. By statute, nuncupative (oral) wills disposing of personal property are valid under some circumstances. See CODE OF LAWS OF SOUTH CARO-

1. The will must be in writing and signed by the testator.²⁹⁹ Should the testator be unable to write, he may make his mark,³⁰⁰ or the will may be signed by some other person in his presence and by his express direction.³⁰¹

2. The testator's signature must be witnessed by three persons, who also must sign the will in the presence of the testator and in the presence of each other.³⁰² As a practical matter, the witnesses to the will should be disinterested and responsible persons. If a witness is a person to whom the will makes a gift, or the spouse (husband or wife) of such person, although the will is valid, the gift made will be void to the extent that it exceeds in value what the beneficiary would have taken had the testator died without a will.³⁰³ In like manner, if an executor or trustee appointed by the will, or the spouse of such person, acts as a witness, the executor or trustee can receive no compensation for service in such capacity.³⁰⁴ However, a creditor of the testator may act as witness to a will notwithstanding the fact that the will makes the debt of the creditor a charge on lands owned by the testator.³⁰⁵

b. Will Executed Out of State

A will executed in another state or country in accordance with the law thereof is legally sufficient in South Carolina if it is in writing and signed by the testator.³⁰⁶

5. Alteration and Revocation of Wills

A will does not become operative until the death of the maker, and during the maker's lifetime he may change or revoke it.³⁰⁷

LINA §§ 19-291 thru 294 (1952). Also, special provision is made for wills of personal property by soldiers in actual military service, and mariners and seamen at sea. CODE OF LAWS OF SOUTH CAROLINA § 19-206 (1952).

299. CODE OF LAWS OF SOUTH CAROLINA § 19-205 (1952).

300. Ray v. Hill, 3 Strob. 297 (1848).

301. CODE OF LAWS OF SOUTH CAROLINA § 19-205 (1952); *Ex parte Leonard*, 39 S. C. 518, 18 S. E. 216 (1893).

302. CODE OF LAWS OF SOUTH CAROLINA § 19-205 (1952); *Tucker v. Oxner*, 12 Rich. L. 141 (1859).

303. CODE OF LAWS OF SOUTH CAROLINA § 19-260 (1952); *Davis v. Davis*, 208 S. C. 182, 37 S. E. 2d 530 (1946).

304. CODE OF LAWS OF SOUTH CAROLINA § 19-260 (1952).

305. CODE OF LAWS OF SOUTH CAROLINA § 19-261 (1952).

306. CODE OF LAWS OF SOUTH CAROLINA § 19-207 (1952).

307. *Lowe v. Fickling*, 207 S. C. 442, 36 S. E. 2d 293 (1946); *Stanton v. David*, 193 S. C. 108, 7 S. E. 2d 852 (1940); *Dicks v. Cassels*, 100 S. C. 341, 84 S. E. 878 (1915).

a. By a Later Will

A will is revoked by the making of a later will which states that it is intended to revoke earlier ones.³⁰⁸ Even if the later will states no intention to revoke an earlier one, the earlier will is revoked to the extent that the provisions in the subsequent will are inconsistent with those in the prior one.³⁰⁹

b. By a Codicil

If the maker does not wish to revoke his entire will but merely to change certain provisions therein, he may do this by a later instrument which states the changes he intends to make. Such an instrument drawn to supplement a will is known as a codicil.³¹⁰ A codicil is not legally sufficient unless it is executed with the same formalities that are required for a will.³¹¹ Also, it may be revoked in the same manner that a will may be revoked.³¹²

c. By Physical Destruction

A will is revoked if with the intention of revoking it, it is destroyed or obliterated, either by the maker himself, or by another person in his presence and by his direction.³¹³ The term "destroyed" embraces burning, cancelling or tearing, and the slightest of such acts with the intention to revoke is sufficient.³¹⁴ Unless there was an intention to revoke the will, it is not revoked by a physical destruction.³¹⁵

d. By Cancellation of a Single Clause³¹⁶

If the maker marks out a clause in his will with the intention of revoking only it, that clause alone is revoked by his act.³¹⁷ However, such a procedure is not recommended,

308. CODE OF LAWS OF SOUTH CAROLINA § 19-221 (1952), as amended, 48 Stat. 1745 (1954).

309. *Richardson v. Richardson*, Dudley's Eq. 184 (S. C. 1838).

310. CODE OF LAWS OF SOUTH CAROLINA § 19-221 (1952), as amended, 48 Stat. 1745 (1954).

311. CODE OF LAWS OF SOUTH CAROLINA §§ 205, 221 (1952), as amended, 48 Stat. 1745 (1954).

312. *Supra* p. 533 *et seq.*

313. CODE OF LAWS OF SOUTH CAROLINA § 19-221 (1952), as amended, 48 Stat. 1745 (1954).

314. *Johnson v. Brailsford*, 2 N. & McC. 272 (S. C. 1820).

315. *Davis v. Davis*, 214 S. C. 247, 52 S. E. 2d 192 (1949).

316. See generally Karesh, *Partial Revocation of Will by Cancellation*, 7 S. C. L. Q. 196 (1954); Annot., 24 A. L. R. 2d 514 (1952).

317. *Brown v. Brown*, 91 S. C. 101, 74 S. E. 135 (1912). *But see* *Stevens v. Royalls*, 223 S. C. 510, 77 S. E. 2d 198 (1953), and *Pringle v. McPherson*, 2 Brev. 279 (S. C. 1809), holding no revocation where testator attempted ineffectual substitute provision.

since in all probability it will result in a law suit after the death of the testator. Also, it must be remembered that after a will has been executed, the maker cannot informally write in new provisions, since any additions to his plan must be made either in a new will, or by a codicil to his old one.³¹⁸

e. By Subsequent Marriage

By statute, if a person who has made a will thereafter marries and dies survived by his widow or issue (children or more remote descendants) of the marriage, the will is revoked by operation of law unless it expressly was made in contemplation of marriage and contains provisions for the future wife and children.³¹⁹ The statute also applies when the testator was married when he made his will but remarried following death or divorce of the spouse.³²⁰ The statute is equally applicable in the case of a will made by a woman.³²¹

6. Void and Lapsed Gifts³²²

A testamentary gift provided for a person dead at the making of the will is referred to as a void gift, and is ineffective.³²³ A testamentary gift provided for a person who was alive when the will was made but who predeceases the maker is said to lapse, and ordinarily also is ineffective.³²⁴ However, a South Carolina statute,³²⁵ commonly known as the lapse statute, or the anti-lapse statute, provides that if the deceased person to whom a lapsed gift is made was a child of the maker, and has issue (a child or more remote descendant) living at the maker's death, the issue take the gift made by the will to their parent. (It is to be noted that the statute applies only to gifts to children, and not to gifts to grandchildren³²⁶ or other relatives.) The statute is not applicable if the will expresses an intention to exclude the children of

318. *Stevens v. Royalls*, 223 S.C. 510, 77 S. E. 2d 198 (1953). Compare *Pringle v. McPherson*, 2 Brev. 279 (S. C. 1809).

319. CODE OF LAWS OF SOUTH CAROLINA § 19-222 (1952); *Howell v. Littlefield*, 211 S. C. 462, 46 S. E. 2d 47 (1947); *McJunkin v. Moody*, 194 S. C. 95, 9 S. E. 2d 209 (1940).

320. *McJunkin v. Moody*, 194 S. C. 95, 9 S. E. 2d 209 (1940).

321. *In re Will of Roton*, 95 S. C. 118, 78 S. E. 711 (1913).

322. See generally ATKINSON, *WILLS* § 140 (2d ed. 1953).

323. *Padgett v. Black*, 229 S. C. 142, 92 S. E. 2d 153 (1956); *Suber v. Nash*, 84 S. C. 12, 65 S. E. 947 (1909); *Pegues v. Pegues*, 11 Rich. Eq. 554 (S. C. 1860).

324. *Nash v. Gardner*, 226 S. C. 165, 84 S. E. 2d 375 (1954); *Albergotti v. Summers*, 203 S. C. 137, 26 S. E. 2d 395 (1943). See *Karesh, Lapse and Residue-Survey of Recent Decisions*, 8 S. C. L. Q. 150, 154 (1955).

325. CODE OF LAWS OF SOUTH CAROLINA § 19-237 (1952).

326. *Logan v. Brunson*, 56 S. C. 7, 33 S. E. 737 (1899).

the deceased child.³²⁷ Furthermore, it is uncertain if the statute applies where the gift in the will is not to the deceased child individually, but is a class gift to the maker's children as a group.³²⁸ For example, I give my farm to my children, rather than I give my farm to my son John, or I give my farm to my sons John and Henry. Also, the statute will not apply if the child for whom the gift is provided died before the making of the will.³²⁹

7. Ademption³³⁰

Suppose that a will provides for a gift of some specific thing, either land (a specific devise), or other than land (a specific legacy), which the testator owned when the will was made. However, during his lifetime the testator thereafter either disposed of the thing, or, if it were other than land, it was destroyed or extinguished.³³¹ In such case since the testator does not own the thing at his death, the gift is said to be adeemed (taken away), and is ineffective.³³² If, however, the gift is not of a specific thing owned by the testator when the will was made, but is a gift of a kind of thing to be conferred out of the testator's general assets, the gift is a general legacy, and the fact that at his death the testator does not own that kind of thing will not defeat the gift.³³³

To illustrate, suppose the legacy is "I give 100 shares of General Motors Corporation to John." Nothing further appearing, the legacy is construed to be a general rather than a specific one, and the fact that the testator owned no such stock at his death does not defeat the legatee's claim. Consequently, assets of the estate not specifically disposed of by the will must be used to purchase 100 shares of General Motors Corporation to be given to John, or he may have an amount of money sufficient for the purchase.³³⁴

327. ATKINSON, WILLS at 780 (2d ed. 1953). See Annot., 92 A. L. R. 846 (1934); Annot., 63 A. L. R. 2d 1172 (1959).

328. ATKINSON, WILLS at 782 (2d ed. 1953). See Annot., 56 A. L. R. 2d 948 (1957).

329. See note 323 *supra*.

330. See generally ATKINSON, WILLS § 134 (2d ed. 1953); Karesh, *Ademption*, 10 S. C. L. Q. 159, 161 (1957).

331. *Rikard v. Miller*, 231 S. C. 98, 97 S. E. 2d 257 (1957); *Rogers v. Rogers*, 67 S. C. 168, 45 S. E. 176 (1903).

332. *Ibid.*; See ATKINSON, WILLS § 134 (2d ed. 1953).

333. *Cornelson v. Vance*, 220 S. C. 47, 66 S. E. 2d 421 (1951); ATKINSON, WILLS at 742. As to the possibility in South Carolina of a general devise, see *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 812 (1888); *Floyd v. Floyd*, 29 S. C. 102, 7 S. E. 42 (1888).

334. *Cornelson v. Vance*, 220 S. C. 47, 66 S. E. 2d 421 (1951); *Boykin v. Boykin*, 21 S. C. 513; ATKINSON, WILLS § 132 (2d ed. 1953); Annot., 22 A. L. R. 2d 457 (1952).

On the other hand, if the legacy had been "I give all my shares of General Motors Corporation to John", the legacy would be construed to be a specific one, and would fail if at his death the testator owned no such stock.³³⁵

In many cases the words of gift are such that it is uncertain whether the testator intended a general or a specific legacy. In such cases the court may consider other language in the will, as well as the circumstances existing when it was drawn, in an effort to make clear the testator's meaning.³³⁶

Even though the legacy is a specific rather than a general one, a change in the form of the thing given, if not substantial, will not defeat the legatee's interest. To illustrate, if the 100 shares of General Motors Corporation which the will specifically gave John had been split into 200 shares during the life of the testator, John would be entitled to these 200 shares, assuming the testator owned them at his death, since the 200 shares represent the 100 shares given John in the will.³³⁷

Where a testator makes a gift of the proceeds of property and thereafter himself receives the proceeds, there is no ademption provided the proceeds can be traced and identified.³³⁸ If, however, the proceeds cannot be identified, or traced into some fund such as a bank account, the legatee loses the gift.³³⁹ For example, suppose the will directs the executor to collect the amount due on certain mortgages owned by the testator and to pay the proceeds thereof to John, but that after the making of the will the testator himself collected the mortgages and deposited the proceeds in a separate bank account. Since the proceeds of the mortgages can be traced and identified, the legacy is not adeemed and John will be paid the amount deposited in the separate account.³⁴⁰ However, if the testator had not deposited the sums he collected in a special account, but had dealt with them in such fashion that they could no longer be traced and identified, the legacy would be held to be adeemed.³⁴¹

335. *Keegan v. Norton*, 322 Mass. 158, 76 N. E. 2d 1 (1947). See Annot., 61 A. L. R. 2d 449 (1958).

336. ATKINSON, WILLS at 731, 732, and nn. 4 & 5 (2d ed. 1953).

337. See cases in Annot., 7 A. L. R. 2d 276, 281 (1949).

338. *Gist v. Craig*, 142 S. C. 407, 141 S. E. 26 (1927); *Watson v. Watson*, 230 S. C. 247, 95 S. E. 2d 266 (1956). See Karesh, *supra* note 331; Annot., 165 A. L. R. 1032 (1946).

339. *Stanton v. David*, 193 S. C. 108, 7 S. E. 2d 852 (1940).

340. See note 338 *supra*.

341. See note 339 *supra*.

A demonstrative legacy is a bequest, usually of money, to be paid out of a particular fund, but payable out of other assets if this fund fails.³⁴² To illustrate, suppose a will provides, "I give \$2000 out of my deposit in X Savings and Loan Association to John." Such a gift, like a general legacy, is not subject to ademption. Thus, if the testator had withdrawn the deposit before his death, John has a general legacy of \$2000 payable out of other assets not the subject of specific or demonstrative gifts.³⁴³

8. Satisfaction³⁴⁴

Suppose a will provides for a legacy of money, but during the testator's life he thereafter gave an equal amount to the legatee with the intention that the gift should take the place of the legacy. In such a case the legacy is said to be satisfied, and the legatee cannot take the amount under the will.³⁴⁵ The testator's intention at the time he made the gift is the controlling factor, and if the legatee is the testator's child or one to whom the testator stands *in loco parentis* (in the place of a parent), unless shown otherwise it is presumed that the gift was intended as a satisfaction of the legacy.³⁴⁶ However, if the legatee is other than one of the above persons, he may take the amount under the will unless it be shown that the testator intended the gift to satisfy the legacy.³⁴⁷

A legacy of money may be satisfied in part by a gift of a lesser sum; for example, an inter vivos gift of \$1000 made with the intention of partially satisfying a legacy of \$2000 will preclude the legatee from taking more than \$1000 of the \$2000 legacy provided in the will.³⁴⁸ This is true even if the legacy is not for a definite sum of money, but is a residuary one (a

342. See, e.g., *White v. White*, 73 S. C. 261, 53 S. E. 371 (1906); ATKINSON, WILLS at 734 (2d ed. 1953); Annot., 6 A. L. R. 1353 (1920); Annot., 73 A. L. R. 1250 (1931).

343. *Ibid.*

344. See generally ATKINSON, WILLS § 133 (2d ed. 1953); Annot., 26 A. L. R. 2d 9 (1952); Barstow, *Ademption by Satisfaction*, 6 WIS. L. REV. 217 (1931).

345. *Ibid.*

346. *Allen v. Allen*, 13 S. C. 512 (S. C. 1880); *Richardson v. Richardson*, Dudley's Eq. 184 (S. C. 1838). See ATKINSON, WILLS § 133, at 737, 738 (2d ed. 1953); Annot., 94 A. L. R. 26, 190 (1935). The presumption is inapplicable if the gift to the child is a residuary one. *Allen v. Allen*, *supra*. Furthermore, there is no presumption that the testator intended a satisfaction of the legacy if the legatee is a grandchild. *Ibid.*

347. *Allen v. Allen*, *supra* note 346; ATKINSON, WILLS § 133, at 738 (2d ed. 1953).

348. *Allen v. Allen*, 13 S. C. 512, 525 (1880); ATKINSON, WILLS § 133, at 739.

gift of all the testator's remaining property), if such was the testator's intention.³⁴⁹

Where the legacy is not a money one, but is a gift of specific property, for example, a horse, or furniture, the legacy will be ineffective if during the testator's life the property thereafter is given to the legatee.³⁵⁰ Furthermore, even though the gift was not of the identical thing mentioned in the legacy, under some circumstances it may be found that the testator intended an inter vivos gift of another thing or of money as a satisfaction of the legacy.³⁵¹

When the testamentary gift is a devise (a gift of land) rather than a legacy (a gift of personal property), the devise is not satisfied by a gift of other land or other property made by the testator during his life.³⁵²

C. Advancements³⁵³

1. Nature and Effect

Not infrequently a parent during his or her³⁵⁴ life gives real or personal property to one of several children with the intention that the property so given shall constitute all or a part of the share which the child will be entitled to when the parent's estate is divided at death. In such a case the parent is said to have advanced, or to have made an advancement to, the child to whom the gift was made. If the parent thereafter dies intestate, children to whom no advancements were made, or those who received smaller ones, may require that the value of advancements be considered in computing each child's share of the parent's decedent estate.³⁵⁵

To illustrate, let us consider the case of a man who dies intestate, survived by a widow and 3 children, C1, C2, and C3, leaving a net estate valued at \$45,000. If the intestate advanced none of his children during his lifetime, his widow will

349. *Allen v. Allen*, *supra* note 348, at 527; ATKINSON, WILLS § 133, at 740 (2d ed. 1953).

350. ATKINSON, WILLS § 133, at 740 (2d ed. 1953).

351. *Richardson v. Richardson*, Dudley's Eq. 184 (S. C. 1838); ATKINSON, WILLS § 133, at 740 (2d ed. 1953).

352. *Allen v. Allen*, 13 S. C. 512 (1880). See *Godbold v. Vance*, 14 S. C. 458 (1881); *Gregg v. McMillan*, 54 S. C. 378, 32 S. E. 447 (1898). See *Karesh*, 10 S. C. L. Q. 159, at 165-166 (1957).

353. See generally CODE OF LAWS OF SOUTH CAROLINA § 19-56 (1952); *Karesh*, *Advancements*, 2 S. C. L. Q. 346 (1950); ATKINSON, WILLS § 129 (2d ed. 1953).

354. The advancement doctrine applies to gifts by a mother as well as to those by a father. *Rees v. Rees*, 11 Rich. Eq. 86 (S. C. 1859).

355. ATKINSON, WILLS § 129 (2d ed. 1953).

be entitled to \$15,000 ($\frac{1}{3}$ of his estate) and each of the children will be entitled to \$10,000 ($\frac{1}{3}$ of the remaining \$30,000).³⁵⁶ Suppose, however, that during the father's lifetime he had advanced C1 property valued at \$20,000, and C2 property valued at \$4,000, valuations being made as of the time of the father's death. In such case the widow still would take but \$15,000, $\frac{1}{3}$ of the net value of the property which the decedent owned at his death.³⁵⁷ The shares of the children, however, would be computed as follows. Under the advancement doctrine a child who was advanced cannot share in the decedent estate unless he figuratively brings his advancement into hotchpot, that is, allows it to be treated as part of the fund for division among all the children.³⁵⁸ Since C1's advancement (\$20,000) exceeds the intestate share he would take if he came into hotchpot (\$20,000 + \$4,000 + \$30,000 = \$54,000, divided by 3 = \$18,000), he will not do so, and therefore he will take no part of the decedent estate. On the other hand, C2 will bring his gift (\$4,000) into hotchpot, since this will entitle him to the further sum of \$13,000 from the decedent estate (\$4,000 + \$30,000 = \$34,000, divided by 2 = \$17,000). After payment of this further sum to C2, \$17,000 remains in the decedent estate for C3, thus equalizing his share with the total received by C2.

Unless the will directs otherwise,³⁵⁹ the advancement doctrine is inapplicable if the parent dies wholly testate,³⁶⁰ or in case of a partial intestacy (where the will does not dispose, or ineffectually disposes, of some of the decedent's property).³⁶¹

Not every gift a parent makes a child is regarded as an advancement which later will be charged against the child's share of the parent's intestate estate. It may be that the parent made an absolute gift, which does not affect the child's

356. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952).

357. *Ex parte Lawton*, 3 Des. Eq. 199 (1811).

358. Karesh, *Advancements*, 2 S. C. L. Q. 346, 347 (1950).

359. *Manning v. Manning*, 12 Rich. Eq. 410 (S. C. 1866). See also *Hammett v. Hammett*, 38 S. C. 50, 62, 16 S. E. 293 (1892); *Hughes v. Kirkpatrick*, 37 S. C. 161, 171, 15 S. E. 912 (1892); *McFall v. Sullivan*, 17 S. C. 504 (1883); *Allen v. Allen*, 13 S. C. 513, 528 (1880); *Newman v. Wilbourne*, 1 Hill Eq. 10, 11 (S. C. 1833).

360. *Newman v. Wilbourne*, 1 Hill Eq. 10 (S. C. 1833); *McDougald v. King*, Bail. Eq. 154 (S. C. 1830). See also note 359 *supra* and note 361 *infra*.

361. *Douglass v. Brice*, 4 Rich. Eq. 322 (S. C. 1852); *Snelgrove v. Snelgrove*, 4 Des. Eq. 274 (S. C. 1812); *Richardson v. Sinkler*, 2 Des. Eq. 127 (S. C. 1802).

right later to take a share of the decedent estate equal in amount to that taken by other children. In most states the parent's intention at the time he made the gift determines whether or not there was an absolute gift or an advancement.³⁶² However, in South Carolina the intention of the parent is not the controlling factor, but the circumstances and character of the gift itself.³⁶³ Thus the court has said:

"A father may give his son half his estate and declare, by the most formal instrument, that he does not intend it as an advancement; but, if he afterwards dies intestate, the law precludes such son from any share in the inheritance, unless he bring such gift into hotchpot. What is, or is not, an advancement may depend on circumstances, . . . but the mere declarations of the donor cannot alter the operation of the law either as to the character of the gift, or even the mode of valuation."³⁶⁴

Where a father who paid for land had the deed therefor made to a son, and thereafter allowed the son to treat the land as his own, the transaction was held to be an advancement to the son.³⁶⁵ In like manner, a father conveying land to a child by a deed reserving to the father the use of the land for life, as well as power to revoke the conveyance, has made an advancement of the land to the child as of the time of the father's death.³⁶⁶ And a father conveying land by deed to his wife for life, with remainder after her death to certain of his children, has made an advancement to the children of the remainder interest in the land.³⁶⁷ However, a child is not chargeable as for an advancement with the rent of land which the parent permitted him to occupy but did not convey to him.³⁶⁸

Money expended on the education of a child, whether professional or general, is not an advancement.³⁶⁹ Although a gift for the purpose of pleasure or amusement, as of a saddle

362. Karesh, *Advancements*, 2 S. C. L. Q. at 347 (1950). See Annot., 26 A. L. R. 1089, 1093 (1923).

363. Karesh, *Advancements*, 2 S. C. L. Q. at 347 (1950).

364. *Rees v. Rees*, 11 Rich. Eq. 86, 108 (1859). See also *Rickenbacker v. Zimmerman*, 10 S. C. 110, 121 (1878); *Heyward v. Middleton*, 65 S. C. 493, 43 S. E. 95 (1903).

365. *Catoe v. Catoe*, 32 S. C. 595, 10 S. E. 1078 (1890).

366. *Hughey v. Eichelberger*, 11 S. C. 36 (1878).

367. *Cain v. Cain*, 53 S. C. 350, 31 S. E. 278 (1898).

368. *Ison v. Ison*, 5 Rich. Eq. 15 (S. C. 1852). See *Wilson v. Kelly*, 21 S. C. 535 (1884), a loan of personal property is not an advancement.

369. *White v. Moore*, 23 S. C. 456 (1885); *Cooner v. May*, 3 Strob. Eq. 185 (S. C. 1849).

horse, is not an advancement, the gift of income producing property, such as a stallion to be bred for profit, is an advancement.³⁷⁰ A father who paid the premiums for a policy of insurance he took out on his own life for the benefit of a child has advanced the policy and the amount of the premiums to the child.³⁷¹ Likewise, a parent who during her life cancels a debt owed by a child has made an advancement of the amount of the debt.³⁷²

The children of a deceased child of an intestate take as a group the share to which their parent would have been entitled had he been living at the intestate's death.³⁷³ In such a case gifts made to the grandchildren prior to their parent's death are not charged against them as advancements. However, any advancements made to the parent during his lifetime are charged against them, as are any gifts in the nature of an advancement made to them after the death of their parent.³⁷⁴

2. Waiver

Children who were not advanced or who were advanced a smaller portion waive the protection of the advancement doctrine if they do not insist on its application. Thus if they enter into a settlement, or accept their distributive share of the parent's intestate estate, they may not later contend that another child was unequally advanced, in the absence of fraud, misrepresentation, concealment, or mistake of fact.³⁷⁵

3. Valuation

In South Carolina, unlike the rule in most states,³⁷⁶ an advancement is valued as of the time of the intestate's death, but the valuation is based upon the condition of the property at the time the gift was made.³⁷⁷ To illustrate, suppose a

370. *Ison v. Ison*, 5 Rich. Eq. 15 (S. C. 1852).

371. *Rickenbacker v. Zimmerman*, 10 S. C. 110 (1878). The court held the sum advanced was not the face amount of the policy, however. See discussion of the case in Karesh, *Advancements*, 2 S. C. L. Q. 346, 349 (1950).

372. *Rees v. Rees*, 11 Rich. Eq. 15 (S. C. 1852); *Ex parte Glenn*, 20 S. C. 64 (1883).

373. CODE OF LAWS OF SOUTH CAROLINA § 19-52 (1952).

374. *Rees v. Rees*, 11 Rich. Eq. 86 (S. C. 1859); *McLure v. Steele*, 14 Rich. Eq. 105 (1868).

375. *Miley v. Deer*, 93 S. C. 66, 76 S. E. 27 (1912); *Murrel v. Murrel*, 2 Strob. Eq. 148 (S. C. 1848).

376. Karesh, *Advancements*, 2 S. C. L. Q. 346, 348 (1950); Annot., 26 A. L. R. 1178 (1923). See MODEL PROBATE CODE § 29.

377. CODE OF LAWS OF SOUTH CAROLINA § 19-56 (1952). See *Wilson v. Kelly*, 21 S. C. 535, 539 (1884).

father gives one of his sons a breeding bull three years of age, and ten years after the gift, the father dies. If the gift is brought into hotchpot, its value will be estimated as that of a breeding bull three years of age, and whatever such a bull would be worth at the time of the father's death will be charged the son as an advancement.³⁷⁸

Where money has been advanced, the dollar value of the gift is the measuring unit, and fluctuations in purchasing power are disregarded.³⁷⁹ Where there has been a gift of land, improvements made by the child are disregarded in valuing the advancement.³⁸⁰ In like manner, where personal property was given, the increase of such personal property (for example, the litter of a sow, or interest paid on a bond) is not taken into account when valuing the gift.³⁸¹

The South Carolina formula has been applied to value an advancement by a father of an insurance policy on his own life.³⁸² It has been suggested that in certain cases involving gifts of land or chattels which have drastically fluctuated in value, application of the formula may become difficult or impossible.³⁸³

VII. ADMINISTRATION

Administration is the procedure prescribed by law to insure that the personal assets of the deceased are collected and preserved until such time as all lawful claims against the estate have been paid, after which the remaining assets are distributed to the beneficiaries of the estate.³⁸⁴

A. *Necessity of Administration*

As a rule, there will be an administration of the estate of a man who died testate (with a will).^{384a} If a decedent died intestate (without a will), administration sometimes

378. See *McCaw v. Blewit*, 2 McC. Eq. 90, 104 (S. C. 1827), giving an analogous example of a gift of a slave.

379. *Karesh, Advancements*, 2 S. C. L. Q. 346, 349 (1950).

380. CODE OF LAWS OF SOUTH CAROLINA § 19-56 (1952).

381. *Ibid.*

382. *Rickenbacker v. Zimmerman*, 10 S. C. 110 (1878), discussed *Karesh, Advancements*, 2 S. C. L. Q. 346, 349 (1950).

383. *Karesh, Advancements*, 2 S. C. L. Q. 346, 350 (1950).

384. ATKINSON, WILLS at 561 (2d ed. 1953).

384a. See generally ATKINSON, WILLS at 564 (2d ed. 1953). By law a decedent's will must be filed in the probate court. See notes 428, 429 *infra*. Usually this results in its probate and a complete administration. Also, only if probated does a will provide a muniment of title. See, as to land, CODE OF LAWS OF SOUTH CAROLINA § 19-408 (1952); as to personalty, *Myers v. O'Hanlon*, 12 Rich. Eq. 196, 204 (S. C. 1861).

may be dispensed with, particularly when (1) a decedent's personal property is of small value and can be reduced to possession without legal action, (2) it is certain that all his creditors are known, and (3) his heirs, all of whom are over 21 years of age and of sound mind, are agreed on a division of his property.³⁸⁵ However, before deciding to omit administration the heirs should consult a lawyer, since in many situations such omission may result in financial loss to them.³⁸⁶

If an intestate's personal property is of the value of \$1000 or less, the judge of probate is specially authorized to settle and distribute the estate without the requirement of a formal administration.³⁸⁷

B. *The Personal Representative*

The person appointed to administer a decedent's estate is known as the personal representative.³⁸⁸ An intestate's personal representative is called an administrator.³⁸⁹ If an administrator dies or is removed before completion of administration, the successor appointed is known as an administrator *de bonis non* (also known as administrator *d.b.n.*, and meaning administrator of goods not administered).³⁹⁰

The personal representative named in a will is known as the executor.³⁹¹ If the will names no executor, or if the person so named is for some reason disqualified, or refuses to serve, the court appoints an administrator with the will annexed (also known as administrator *cum testamento annexo*, or administrator *c.t.a.*).³⁹² If an executor who has undertaken

385. Among other South Carolina cases are these: *Lerner v. Bluestein*, 175 S. C. 59, 178 S. E. 265 (1935); *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891 (1902); *Miles v. Wise*, 11 Rich. Eq. 536 (S. C. 1860); *Huson v. Wallace*, 1 Rich. Eq. 1 (S. C. 1844); *Spann v. Jennings*, 1 Hill Eq. 324 (S. C. 1833). See Annot., 70 A. L. R. 386 (1931). ATKINSON, WILLS § 103 (2d ed. 1953). Of course, any death taxes owed must be paid. See notes 409, 410, 577, 582 *infra*.

386. CODE OF LAWS OF SOUTH CAROLINA §§ 19-611 thru 613 (1952). See cases there annotated concerning the applicability in South Carolina of the doctrine of executor de son tort. In general, this doctrine makes one who intermeddles with a decedent's personal property liable to the decedent's creditors to the extent of the value of the property so intermeddled with. See ATKINSON, WILLS at 571 (2d ed. 1953).

387. CODE OF LAWS OF SOUTH CAROLINA § 19-555 (1952), as amended, 49 Stat. 1785 (1952); 50 Stat. 1687 (1958). See Karesh, *Wills and Trusts*, 9 S. C. L. Q. 160, 172 (1956).

388. ATKINSON, WILLS § 104 (2d ed. 1953).

389. *Ibid.*

390. CODE OF LAWS OF SOUTH CAROLINA § 19-416 (1952). See *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279 (1923).

391. ATKINSON, WILLS § 104 (2d ed. 1953).

392. CODE OF LAWS OF SOUTH CAROLINA §§ 19-414, 415 (1952).

the office dies or is removed before completion of administration, his successor appointed is an administrator *de bonis non* with the will annexed (also known as administrator *de bonis non cum testamento annexo*, or administrator *d.b.n. c.t.a.*).³⁹³

The appointment of an administrator is known as a grant of letters of administration.³⁹⁴ The action of the probate court with respect to an executor nominated in a will is known as a grant of letters testamentary.³⁹⁵

1. Legal Qualifications

A person under 21 years of age cannot serve as an executor³⁹⁶ or administrator.³⁹⁷ State banks and trust companies³⁹⁸ and national banks³⁹⁹ may act as personal representatives. No corporation created by another state, or by a foreign state, kingdom or government, may serve as personal representative of the estate of any person who dies domiciled (with his home) in this State, either testate or intestate.⁴⁰⁰ Subject to certain special provisions, a nonresident individual may serve as executor or administrator of the estate of a South Carolina decedent.⁴⁰¹

2. By Whom Appointed

The personal representative is appointed by the judge of probate for the county in which the deceased was last an inhabitant.⁴⁰² If the deceased was not an inhabitant of South Carolina, the personal representative is appointed by the judge of probate for the county in which the greater part of the deceased's estate may be.⁴⁰³

3. Person Entitled to Administer an Intestate's Estate

A statute⁴⁰⁴ thus prescribes the order of priority for the grant of administration of an intestate's estate:

- 393. CODE OF LAWS OF SOUTH CAROLINA § 19-416 (1952).
- 394. CODE OF LAWS OF SOUTH CAROLINA §§ 19-403, 414 thru 416 (1952).
- 395. CODE OF LAWS OF SOUTH CAROLINA § 19-405 (1952).
- 396. CODE OF LAWS OF SOUTH CAROLINA § 19-417 (1952).
- 397. See CODE OF LAWS OF SOUTH CAROLINA § 19-403 (2) (1952), as to the appointment as administrator of the legal representative of a child of the intestate.
- 398. CODE OF LAWS OF SOUTH CAROLINA § 8-241 (1952).
- 399. 12 U. S. C. A. 248 (k) (1954).
- 400. CODE OF LAWS OF SOUTH CAROLINA § 19-592 (1952).
- 401. CODE OF LAWS OF SOUTH CAROLINA §§ 19-591 thru 600 (1952) and amendments thereto. *Stubbs v. Ratliff*, 202 S. C. 67, 24 S. E. 2d 127 (1943); and *Ex parte Peele*, 85 S. C. 140, 67 S. E. 135 (1910) criticize dictum *contra* in *In re Neubert*, 58 S. C. 469, 36 S. E. 908 (1900).
- 402. CODE OF LAWS OF SOUTH CAROLINA § 19-401 (1952).
- 403. *Ibid.*
- 404. CODE OF LAWS OF SOUTH CAROLINA § 19-403 (1952).

(1) To the husband or wife of the deceased; *provided*, always, that if any widow, after having obtained letters of administration, shall marry again the judge of probate may revoke the administration before granted or join one or more of the next of kin in the administration with her;

(2) If there be no husband or wife of the deceased or they do not apply, then to the child or children or their legal representatives;

(3) In default of them, then to the father or mother;

(4) In default of them, to the brothers and sisters;

(5) In default of them, to such of the next of kindred of the deceased, at the discretion of the judge of probate, as shall be entitled to a distributive share of the intestate's estate; and

(6) In default of such, to the greatest creditor or creditors or such other person as the court shall appoint.

If unfitness or hostility of a person entitled to priority under the statute⁴⁰⁵ is shown, the probate court may deny him letters of administration.⁴⁰⁶

4. Person Entitled to Administer a Testate Estate

If a will fails to nominate an executor, or if the executor nominated dies before the testator, or if he refuses to serve, or having qualified, dies or is discharged before the estate is fully administered, the judge of probate then grants letters of administration with the will annexed to the person having the greatest interest under the provisions of the will.⁴⁰⁷ If no person taking an interest under the will applies for letters within three months after the testator's death, such letters are granted to the testator's creditors, and if the creditors fail to apply, then to such other person as may apply therefor.⁴⁰⁸

5. Personal Representative Appointed on Application of South Carolina Tax Commission

If no administration proceedings have been commenced within four months after the death of a person who leaves a decedent estate, upon application by the South Carolina Tax Commission the probate judge shall appoint an administra-

405. *Ibid.*

406. *Ex parte* Tolbert, 206 S. C. 300, 34 S. E. 2d 49 (1945); *Rowell v. Adams*, 83 S. C. 124, 65 S. E. 207 (1909); *Ex parte* Small, 69 S. C. 43, 48 S. E. 40 (1904); *Annot.*, 18 A. L. R. 2d 633 (1951).

407. CODE OF LAWS OF SOUTH CAROLINA § 19-414 (1952).

408. *Ibid.*

tor.⁴⁰⁹ Should such a decedent estate come to the attention of the judge of probate it is his duty four months after the decedent's death to notify the South Carolina Tax Commission thereof, together with his opinion as to whether or not any part of said estate is taxable.⁴¹⁰

6. List of Heirs, Legatees or Devisees

At the time of his appointment an administrator of an intestate estate must prepare and file with the probate court a statement in duplicate showing the names, post office addresses, and ages of the decedent's heirs at law.⁴¹¹ In case the deceased died testate, a like statement must be filed showing the names, post office addresses, and ages of the persons entitled under the will, their relationship, if any, to the decedent, and whether or not they were living at the decedent's death.⁴¹² The statement also must show the name, residence and post office address of each executor, administrator, or legatee.⁴¹³ The judge of probate provides forms for the above statements, which constitute a part either of the petition for letters of administration, or the petition to prove the will in common form and for letters.

7. Appointment of the Administrator of an Intestate Estate

Upon receipt of a petition in writing from the person applying for letters of administration, the judge of probate issues a citation (a written order) to the kindred or creditors of the intestate requiring them to show cause, if they have any, why administration should not be granted to the person applying therefor.⁴¹⁴ This citation is published "on the courthouse door" (usually a bulletin board in the courthouse) for two successive weeks, as well as printed once a week for two successive weeks in a newspaper published in the county.⁴¹⁵ Where an estate in the probate court does not exceed \$500 in value, citations and other notices required by law need not be published in a newspaper.⁴¹⁶

When letters of administration are granted, the administrator must swear or affirm that so far as he knows and

409. CODE OF LAWS OF SOUTH CAROLINA § 19-404 (1952).

410. *Ibid.*

411. CODE OF LAWS OF SOUTH CAROLINA § 19-451 (1952).

412. *Ibid.*

413. *Ibid.*

414. CODE OF LAWS OF SOUTH CAROLINA § 19-409 (1952).

415. *Ibid.*

416. CODE OF LAWS OF SOUTH CAROLINA § 10-1307 (1952), as amended Act No. 771, 1960. See also CODE OF LAWS OF SOUTH CAROLINA §§ 19-410 thru 412 (1952).

believes the deceased died without a will, and that he will perform properly his duties as administrator.⁴¹⁷

The administrator also must enter into a bond with two or more sureties in a sum equal to double the estimated value of the personal property of the intestate, conditioned to insure the administrator's proper performance of his duties.⁴¹⁸ If the surety is a corporate surety authorized and licensed to do business in South Carolina, only one surety is necessary and the bond, in the discretion of the probate court, need only be in a sum equal to one and one-half times the estimated value of the personal property of the intestate.⁴¹⁹

Should the value of the personal estate thereafter be diminished, on petition of the personal representative the probate court may reduce the bond to the amount required for the remaining corpus.⁴²⁰

8. Appointment of the Personal Representative of a Testate Estate

Petition for the grant of letters testamentary or for letters of administration with the will annexed is made in the same manner that petition for letters of administration of an intestate estate is made, and the same citation to creditors and publication thereof is required.

The personal representative must swear that the writing contains the last true will of the deceased so far as he knows or believes, and that he will perform properly the duties of his office.⁴²¹

Unless provided for in the will, no bond is required of a resident executor.⁴²² In the case of a nonresident executor⁴²³ or administrator with the will annexed,⁴²⁴ a bond similar to that required of the administrator of an intestate estate must be provided.

C. *Probate of Wills*

A will which has been probated has been judicially established as a legally effective will.⁴²⁵ Jurisdiction to probate

417. CODE OF LAWS OF SOUTH CAROLINA § 19-431 (1952).

418. CODE OF LAWS OF SOUTH CAROLINA § 19-433 (1952).

419. CODE OF LAWS OF SOUTH CAROLINA § 19-434 (1952).

420. Act No. 678, (1960).

421. CODE OF LAWS OF SOUTH CAROLINA § 19-432 (1952).

422. *Evans v. Adams*, 180 S. C. 214, 185 S. E. 57 (1936); Atty. Gen. Op., Jan. 24, 1958.

423. CODE OF LAWS OF SOUTH CAROLINA § 19-591 (1952), as amended, Act No. 720, (1960).

424. CODE OF LAWS OF SOUTH CAROLINA § 19-438 (1952).

425. ATKINSON, WILLS § 93 (2d ed. 1943).

a will is in the judge of probate for the county in which the deceased was last an inhabitant.⁴²⁶ If the deceased was not an inhabitant of South Carolina, probate jurisdiction is in the judge of probate for the county in which the greater part of the decedent's estate may be.⁴²⁷

A person having possession or control of the will or codicil of a decedent must within thirty days after he learns of the decedent's death deliver the will or codicil to the judge of the probate court having jurisdiction, to be filed in the probate court.⁴²⁸ A person who fails to deliver such a will or codicil to the judge of probate, or who conceals or destroys the same with fraudulent intent, is guilty of a criminal offense punishable by fine or imprisonment.⁴²⁹

It is the duty of one named executor in a purported will to offer the same for probate, and if it is attacked as no will, it is his duty to uphold the validity of the instrument.⁴³⁰ If the executor dies before the testator, or fails to offer the will for probate, or if no executor is named, any interested person may offer the will for probate.⁴³¹ If the judge of probate knows that a devisee or legatee under a will which has not been offered for probate is under a disability (for example, insane or under 21 years of age), the judge of probate must see that probate proceedings are instituted on behalf of the disabled devisee or legatee.⁴³²

A will will not be admitted to probate unless an application for letters testamentary or for letters of administration with the will annexed has been filed, and the executor or administrator duly appointed.⁴³³ Letters testamentary or letters of administration will not be issued to an executor or administrator until he has filed the required list of heirs, legatees, or devisees.⁴³⁴

1. Probate in Common Form

When a paper is offered as the last will of a decedent the judge of probate may convince himself of its authenticity

426. CODE OF LAWS OF SOUTH CAROLINA § 19-401 (1952).

427. *Ibid.*

428. CODE OF LAWS OF SOUTH CAROLINA § 19-264 (1952).

429. CODE OF LAWS OF SOUTH CAROLINA §§ 19-267, 268 (1952).

430. *Carver v. Morrow*, 213 S. C. 199, 48 S. E. 2d 814 (1948); *Ex parte Miller*, 192 S. C. 164, 5 S. E. 2d 865 (1939).

431. ATKINSON, WILLS at 492 (2d ed. 1953).

432. CODE OF LAWS OF SOUTH CAROLINA § 19-265 (1952).

433. CODE OF LAWS OF SOUTH CAROLINA § 19-405 (1952).

434. *Ibid.* See CODE OF LAWS OF SOUTH CAROLINA § 19-451 (1952) discussed at p. 547 *supra*.

in one of the following ways. He may examine one or more of the subscribing witnesses, or, in case of their death or removal from the State, or when their whereabouts are unknown, he may take proof of the handwriting of the testator and of one of the subscribing witnesses.⁴³⁵ If for any reason it is impossible to prove the handwriting of the testator and that of at least one of the subscribing witnesses, he may receive other legally admissible evidence.⁴³⁶ If the judge of probate is satisfied that the paper is the last will of the deceased, he then admits it to probate in common form.⁴³⁷

Probate in common form is good unless a person wishing to contest the will, within the time allowed, notifies the judge of probate of his election to require probate of the will in due form of law (also called probate in solemn form).⁴³⁸ Such notice must be given within six months after probate of the will in common form, unless the contestant at that time was under 21 years of age, in which event he may give notice within six months after he attains the age of 21 years.⁴³⁹

2. Probate in Due Form of Law

The procedure for proving a will in due form of law is as follows. The person offering the will for probate petitions the judge of probate in writing for confirmation of the probate of the will, and all persons who would be entitled to distribution of the estate if the deceased had died intestate are summoned to answer the petition.⁴⁴⁰ The judge of probate then conducts a trial on the issue of will or no will, and in case he finds the proof to be sufficient, he renders a decree establishing the validity of the will.⁴⁴¹

Appeal from the probate court decree may be taken to the Court of Common Pleas, in which event the circuit judge not only reviews rulings of law by the judge of probate, but also conducts a new trial on all disputed issues of fact, which trial must be by jury unless such requirement be waived.⁴⁴²

435. CODE OF LAWS OF SOUTH CAROLINA § 19-253 (1952).

436. *Ibid.*

437. *Ibid.*

438. CODE OF LAWS OF SOUTH CAROLINA § 19-255 (1952), as amended, 49 Stat. 1785 (1956).

439. *Ibid.*

440. *Ibid.*

441. *Ibid.*

442. Among other cases, see *Johnson v. Johnson*, 160 S. C. 158, 158 S. E. 264 (1931); *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285 (1920).

D. *Inventory and Appraisal of Assets*

Within one month after his appointment the executor or administrator must file in the probate court in a form prescribed by the South Carolina Tax Commission, an inventory under oath of the real and personal property in the decedent's estate.⁴⁴³

When a will is proved or application is made for administration of an intestate estate, the judge of probate appoints three or more qualified electors (citizens at least 21 years old who are registered to vote)⁴⁴⁴ to appraise the estate on oath, and to return the appraisement to him.⁴⁴⁵ An appraisal of the real and personal property of the estate must be filed under oath in the probate court by the appraisers so appointed within thirty days after the executor or administrator has filed his inventory of the estate.⁴⁴⁶

E. *Payment of Debts*

1. Notice to Creditors

An executor or administrator, within thirty days after his qualification as such, or as soon thereafter as practicable, must by newspaper advertisement once a week for three consecutive weeks give notice to creditors of the estate to render an account of their demands, duly attested (sworn to).⁴⁴⁷ An executor or administrator is allowed six months, reckoned from the date of his qualification, to ascertain the debts of the deceased.⁴⁴⁸

2. Time Within Which Creditors' Claims Must Be Filed

Claims of creditors must be filed, duly attested, with the executor or administrator or with the judge of probate, not later than the expiration of five months after the first publication of the notice to creditors.⁴⁴⁹ This filing requirement is inapplicable to obligations secured by mortgages or other liens which were duly recorded prior to the expiration

443. CODE OF LAWS OF SOUTH CAROLINA § 19-452 (1952).

444. S. C. CONST. art. 2, §§ 3, 4 (1895); *Blalock v. Johnston*, Governor, 180 S. C. 40, 185 S. E. 51 (1936). It seems that since the nineteenth amendment to the Federal Constitution, women are qualified electors.

445. CODE OF LAWS OF SOUTH CAROLINA § 19-454 (1952).

446. CODE OF LAWS OF SOUTH CAROLINA § 19-455 (1952).

447. CODE OF LAWS OF SOUTH CAROLINA § 19-473 (1952), as amended, 49 Stat. 1785 (1956).

448. *Ibid.*

449. CODE OF LAWS OF SOUTH CAROLINA § 19-474 (1952), as amended, 49 Stat. 1785 (1956).

of the said five months period.⁴⁵⁰ If a creditor fails to file his claim as required, the executor or administrator is not liable for payment of the claim,⁴⁵¹ and, *it seems*, beneficiaries to whom assets of an estate have been distributed likewise are not liable.⁴⁵²

3. Order of Payment of Debts

Should the assets of the deceased be insufficient to pay all claims against his estate, after payment of the commission of the personal representative, the debts will be paid in the following order, with no preference being given among debtors in the same class, except according to legal priority.⁴⁵³

(1) Funeral and other expenses of the last sickness, charges of probate and letters of administration;

(2) Debts due to the public (for example, taxes);

(3) Judgments, mortgages and executions—the oldest first;

(4) Rent; and

(5) Bonds, debts by specialty (instruments under seal) and debts by simple contract.

Mortgages are not entitled to priority over rent and debts by specialty or by simple contract except as to the particular property subject to the lien of the mortgage.

4. Creditor's Suits Against Executor or Administrator — When Barred

No suit for the recovery of debts due by a decedent may be commenced against his personal representative until six months after the decedent's death. However, once a claim has been filed and disallowed, suit must be brought within six months after notice of disallowance to the claimant or his attorney filing the claim, or else the claim is forever barred.⁴⁵⁴

450. *Ibid.*

451. CODE OF LAWS OF SOUTH CAROLINA § 19-475 (1952).

452. CODE OF LAWS OF SOUTH CAROLINA § 19-474 (1952), as amended, 49 Stat. 1785 (1956). See Karesh, *Applicability of Non-Claim Statute*, 11 S. C. L. Q. 159, n. 13 (1958). See also Karesh, *Survival of Actions - Filing of Claims - Parties*, 8 S. C. L. Q. 162 (1955), criticizing *Dubuque Fire and Marine Ins. Co. v. Wilson*, 213 F. 2d 115 (4th Cir. 1954).

453. CODE OF LAWS OF SOUTH CAROLINA § 19-476 (1952).

454. CODE OF LAWS OF SOUTH CAROLINA § 19-554 (1952), as amended, 49 Stat. 1785 (1956). It has been held that the filing of claim is not equivalent to the institution of suit. *J. F. Floyd Mortuary Co. v. Newman*, 222 S. C. 421, 73 S. E. 444 (1952).

5. Sale of Estate Property for Payment of Debts

When a property owner dies the title to his land descends immediately to his heirs at law, or to his devisee if the land was devised,⁴⁵⁵ while title to his personal property vests in his personal representative for the purpose of distribution to those persons entitled.⁴⁵⁶

If the decedent died intestate, the personal property in the administrator's hands constitutes the primary fund for the payment of debts, but if the personal property is insufficient the land which descended to the heirs may be sold for payment thereof.⁴⁵⁷ If the deceased died testate, his land likewise may be used for payment of debts,⁴⁵⁸ though whether it will be used before or after the personal property has in whole or in part been so applied depends upon the provisions of the will. However, if the heir or devisee has conveyed or mortgaged the land for valuable consideration before action is brought to reach the land for debts and more than six months after the decedent's death, the land may not be sold for payment of debts.⁴⁵⁹ In such case, though, the heir or devisee is answerable for debts to the value of the land so conveyed or mortgaged.⁴⁶⁰

F. Duties and Powers of Executors and Administrators

An executor or administrator has title to a decedent's personal property as a fiduciary, his duties being to collect and preserve the assets, to pay debts, and then to distribute any remaining assets to the persons entitled thereto.⁴⁶¹ In the absence of a direction to sell⁴⁶² or a power of sale in a will, an executor or administrator may not sell a decedent's personal property except by order of court.⁴⁶³ In like manner a per-

455. *Carter v. Wroten*, 187 S. C. 432, 198 S. E. 13, 119 A. L. R. 379 (1938).

456. *Ex'rs of Gregory v. Forrester*, 1 McC. Eq. 318 (S. C. 1826). See also note 461 *infra*.

457. *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279 (1923).

458. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331 (1925).

459. CODE OF LAWS OF SOUTH CAROLINA § 19-704 (1952); *J. F. Floyd Mortuary Co. v. Newman*, 222 S. C. 421, 73 S. E. 444 (1952). The statute provides that if the land was mortgaged rather than sold, it is liable to execution subject to the lien of the mortgage. *Ibid*.

460. CODE OF LAWS OF SOUTH CAROLINA § 19-703 (1952).

461. Among other cases see *Redfearn v. Craig*, 57 S. C. 534, 543, 35 S. E. 1024 (1900); *Graves v. Spoon*, 18 S. C. 386, 391 (1883); *McVaughers v. Elder*, 2 Brev. 307, 313 (S. C. 1809). See *Karesh, Probate Jurisdiction Over Testamentary Trusts*, 2 S. C. L. Q. 13, 72 (1949).

462. *Blackmon v. Blackmon*, 113 S. C. 478, 101 S. E. 827 (1920).

463. CODE OF LAWS OF SOUTH CAROLINA §§ 19-515 thru 518 (1952). See *Rhame v. Lewis*, 13 Rich. Eq. 269, 329 (S. C. 1867). Under the authority of

sonal representative cannot sell or convey or mortgage real estate⁴⁶⁴ unless authorized to do so by the will,⁴⁶⁵ or by order of court.⁴⁶⁶

A statute⁴⁶⁷ provides that executors or administrators, by and with the consent of the probate judge, may compromise claims in favor of the estate which are appraised doubtful or worthless. It seems that the statute is permissive only, and does not annul the common law power of the personal representative to enter into a settlement advantageous to the estate.⁴⁶⁸ Nevertheless, as a general rule the personal representative who compromises a claim should proceed under the statute for his own protection.

Subject to approval of the probate court, the personal representative may continue the decedent's farming operations until the end of the year.⁴⁶⁹ However, the probate court may not empower him to continue operation of the farm beyond the year's end, and should he do so he is not entitled to credit (may not charge the estate) for sums he advanced or expended in such operation,⁴⁷⁰ except to the extent that the estate benefitted therefrom.⁴⁷¹ Moreover, he will not be com-

this case, it seems that choses in action may be sold or pledged without court sanction. At common law, an executor or administrator had power to sell, pledge, or mortgage the decedent's personal property. ATKINSON, WILLS at 664 (2d ed. 1953). Under the above statutes, it seems that the power to mortgage or pledge also is extinguished except, perhaps, in the case of choses in action. Karesh, *op. cit. supra* note 461, at 73.

464. See Karesh, *op. cit. supra* note 461, at 70 for a detailed discussion.

465. Finley v. Burgoyne, Dudley Eq. 133 (S. C. 1838). See CODE OF LAWS OF SOUTH CAROLINA § 19-511, 512 (1952), as to the exercise of a testamentary power of sale by a majority of the executors who qualify, or the survivors or survivor of them, or by an administrator c.t.a. But a power to sell does not include a power to mortgage. Allen v. Ruddell, 51 S. C. 366, 29 S. E. 198 (1898); Karesh, *op. cit. supra* note 461, at 71.

466. See CODE OF LAWS OF SOUTH CAROLINA §§ 19-491 thru 505 as to the sale of lands in aid of assets. The probate court and the court of common pleas have concurrent jurisdiction to order such sale. Dorn v. Stidham, 139 S. C. 66, 137 S. E. 331 (1927); Muldrow v. Jeffords, 144 S. C. 509, 142 S. E. 602 (1928). However, only the court of common pleas has jurisdiction to order the mortgaging of lands of the decedent. Mack v. Stanley, 190 S. C. 300, 2 S. E. 2d 792 (1939).

467. CODE OF LAWS OF SOUTH CAROLINA § 19-482 (1952), as amended, Act No. 721, 1960, which also provides for the settlement of actions for wrongful death and conscious pain and suffering, as well as all actions surviving to the personal representative by virtue of any statute of South Carolina or of the United States.

468. Geiger v. Kaigler, 9 S. C. 401 (1877); Karesh, *op. cit. supra* note 461, at 78. See ATKINSON, WILLS at 645, 704 (2d ed. 1953).

469. Smith v. Smith, 105 S. C. 393, 89 S. E. 1032 (1916); *Ex parte Coleman*, 98 S. C. 420, 82 S. E. 674 (1914).

470. Glenn v. Worthy, 169 S. C. 263, 168 S. E. 705 (1933); *Ex parte Coleman*, 98 S. C. 420, 82 S. E. 674 (1914). See Bell v. Mackey, 191 S. C. 105, 145, 3 S. E. 2d 816 (1939).

471. McKee v. Mobley, 3 S. C. 242. See Carolina Life Insurance Co. v. Arrowsmith, 174 S. C. 161, 168; 176 S. E. 728 (1934).

pensated as personal representative for his unauthorized operation of the farm, even though the operation results in a profit.⁴⁷²

G. Returns by Personal Representative

Five months after his appointment the personal representative must file with the judge of probate a verified itemized statement of all claims against the estate, on the basis of which the judge of probate determines what claims are legal liabilities of the estate.⁴⁷³ At the time that this statement is filed and every six months thereafter the personal representative also must file an account under oath, or return, of his receipts and expenditures, covering the preceding period.⁴⁷⁴ But an executor or administrator, with approval of the probate judge, may file his account eleven months after his appointment and every twelve months thereafter instead of at the shorter periods first stated.⁴⁷⁵ Unless the judge of probate, upon a sufficient showing, extends the time for filing a return, or excuses a failure to file the same, the personal representative is not entitled to compensation during the period that he failed to file a return, and he is subject to a suit for damages by any person interested in the estate.⁴⁷⁶ In addition, the personal representative is subject to fine by the judge of probate as well as to removal from office, for failure to make his returns as required by law.⁴⁷⁷

H. Commission Paid the Personal Representative

A personal representative is entitled to a commission of 2½ per cent of the appraised value of all personal assets of the estate which he receives and a commission of 2½ per cent of the appraised value of all personal assets which he pays

472. *Ex parte* Coleman, 98 S. C. 420, 82 S. E. 674 (1914). But see Branton, *Estate Planning*, 2 S. C. L. Q. 103, 109 (1949), to the effect that in such case the personal representative may bring a separate action to recover the value of his services.

473. CODE OF LAWS OF SOUTH CAROLINA § 19-531 (1952), as amended, 49 Stat. 1785 (1956).

474. *Ibid.*

475. CODE OF LAWS OF SOUTH CAROLINA § 19-531.1 (1952), enacted, 50 Stat. 1903 (1958).

476. CODE OF LAWS OF SOUTH CAROLINA § 19-531 (1952), as amended, 49 Stat. 1785 (1956). *Brannon v. Woodward*, 175 S. C. 1, 178 S. E. 249 (1934). Despite his failure to file a return, the personal representative, nevertheless, is entitled to his commission allowed upon the payment to the beneficiaries of any balance in his hands. *Ibid.*; *Blackmon v. Blackmon*, 113 S. C. 478, 101 S. E. 827 (1920).

477. CODE OF LAWS OF SOUTH CAROLINA § 19-532 (1952), as amended, 50 Stat. 1903 (1958).

out in credits, debts, legacies or otherwise during his administration of the estate.⁴⁷⁸ The same commission is payable to a personal representative for the sale of real estate when directed by will or by court order, but when the personal representative is the purchaser at such sale no commission is payable.⁴⁷⁹ Where the personal representative lends moneys of the estate on interest, his commission shall not exceed 10% of the interest paid the estate.⁴⁸⁰ Should the personal representative himself be a creditor or a beneficiary of the estate, he is not entitled to commissions on the amount of any debt, bequest or distributive share he pays to himself.⁴⁸¹

A personal representative who has had extraordinary trouble in the management of an estate and who is not satisfied with the ordinary rate of commission may sue in the court of common pleas for additional compensation, and if a jury so awards, he may recover an additional sum of not more than 5 per cent over and above the commission ordinarily allowed.⁴⁸²

Should there be several executors or administrators, the commission payable is divided among them in proportion to their respective services, the division being made by the judge of probate if they are unable to agree among themselves.⁴⁸³

I. *Distribution of Assets and Discharge of Personal Representative*

Six months after a decedent's death his estate may be closed and distribution made, provided all claims against the estate have been paid.⁴⁸⁴ Pursuant to statutory requirement, the personal representative gives legal notice in a newspaper at least one calendar month in advance that on a named day he will apply to the judge of probate for a final discharge.⁴⁸⁵ On that day, he then makes his final accounting to the probate court, in which not only is shown the payment of all claims

478. CODE OF LAWS OF SOUTH CAROLINA § 19-534 (1952), as amended, 49 Stat. 1785 (1956).

479. *Ibid.*

480. *Ibid.* Massey v. Massey, 2 Hill Eq. 492 (1836), explains the statute's operation.

481. *Ibid.* Despite an ambiguity in the statute, it apparently applies when an administrator pays to himself a distributive share. See *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978 (1902).

482. CODE OF LAWS OF SOUTH CAROLINA § 19-535 (1952).

483. CODE OF LAWS OF SOUTH CAROLINA § 19-536 (1952).

484. CODE OF LAWS OF SOUTH CAROLINA § 19-553 (1952), as amended, Act No. 715, 1960.

485. CODE OF LAWS OF SOUTH CAROLINA § 15-461 (1952). The South Carolina statutes make no provision for a decree of distribution.

against the estate, but also the distribution of the assets which he made to the estate beneficiaries. If this final accounting and the distribution made is approved by the judge of probate, the personal representative is discharged by the grant of letters dismisory. Special procedures are provided in case one or more of the beneficiaries of the estate cannot be found.⁴⁸⁶

VIII. AN OUTLINE OF DEATH AND GIFT TAXES

A. Introduction — *Estimating the Death Tax Liability of The Farmer's Estate*

A necessary step in a farmer's appraisal of the value of the assets which his beneficiaries will receive at his death is a consideration of the shrinkage which may result from the imposition of South Carolina and federal death taxes. The following outline is intended to acquaint the farmer generally with such taxes, as well as to familiarize him with administrative procedures involved in their assessment and collection. The federal gift tax also is discussed, since it is supplementary to the federal estate tax.⁴⁸⁷ As of the date of this bulletin, South Carolina has no tax comparable to the federal gift tax.

In estimating the tax burden which his estate must bear, the farmer must remember that both South Carolina and federal death taxes apply not only to his probate estate (the assets passing by will or intestacy), but extend also to certain property transfers he may have made during his lifetime.

For example, suppose that during his life a farmer gives land or farm machinery to his son. If the land or other thing given is worth more than \$3,000 at the time of the gift, the farmer will have to make a federal gift tax return, and either pay a gift tax, or reduce his \$30,000 specific exemption. (The federal gift tax is explained at page 573.) Moreover, if the gift was made within three years before the farmer's death, unless proven to the contrary the law presumes that it was a transfer made in contemplation of death. (The meaning of a transfer made in contemplation of death is explained at page 568.) As such a transfer, it may be that both state and federal death taxes on the value of the thing given must be paid at the farmer's death. Transfers in contemplation of death

486. CODE OF LAWS OF SOUTH CAROLINA §§ 19-559 thru 566 (1952).

487. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES at 624 (1956).

under the state law are discussed on page 560, and under the federal law on page 568.

Even though the gift was made more than three years before the farmer's death, if he reserved the use of the land or other thing given for his own life, the gift is subject both to state (see page 560) and federal (see page 568) death taxes as a transfer intended to take effect in enjoyment or possession at the death of the donor.

Sometimes a farmer deposits money in a bank or a savings and loan association, payable either to himself or his wife, or to the survivor. In like manner he may have purchased U. S. Savings Bonds payable to himself or his wife, or payable to himself or to his wife on his death. At the farmer's death any deposits or bonds then so held are taxable as a part of his estate, both under state (see page 561) and federal (see page 569) law, except to the extent it can be shown that the deposit or bond either originally belonged to the survivor, or was acquired by the survivor from the deceased for not less than its fair market value.

Life insurance on a farmer's life which is payable to his estate is subject to both state and federal death taxes. If the insurance is payable to a beneficiary (for example, the farmer's wife, child, or other relative, or friend) other than the farmer's own estate, it is not subject to the South Carolina inheritance tax. Such insurance will be subject to the federal estate tax, however, if the farmer possesses any of the incidents of ownership at the time of his death. This is discussed on page 569.

From time to time a farmer should estimate the value of his estate for state and federal death tax purposes. He may do this by totalling the present fair market value of his land, and his personal property, the latter including all items such as farm animals and machinery, household furniture, automobiles, bank and savings and loan accounts, stocks, bonds, etc. Included in this total must be the value of gifts of land or other valuable things made within the past three years, or if he reserved a life interest therein, made more than three years in the past. Also, as explained in the paragraph next above, possible taxation of the farmer's life insurance must not be overlooked.

In determining the amount of a farmer's taxable estate, certain items are deducted from the estimated total value of his

assets. The amount due on mortgages on his land, machinery or cattle should be deducted, as well as any other debts which he owes. Other items deductible for federal and state death tax purposes are listed on page 569 paragraphs (2), (3), and (4).

If the sum of the estimated values of the farmer's assets less the sum of his liabilities is well below \$60,000, the amount of the federal estate tax exemption (discussed on page 569), on the basis of the present value of the farmer's estate and under now existing law no federal estate tax will be owed at his death. On the other hand, if the estimated net value of the estate is close to or in excess of \$60,000, the possibility of federal estate tax liability should be considered.

Even though the estimated net value of a farmer's estate is in excess of \$60,000, it does not necessarily follow that at his death the estate must pay a federal estate tax, since if he has a wife, the marital deduction allowed on the share taken by the wife first must be subtracted before determining whether what remains is in excess of the \$60,000 exemption. The federal marital deduction is explained on page 570, and the state deduction on page 562.

Exemptions allowed under the South Carolina inheritance tax are much smaller than the federal estate tax exemption. Inheritance tax exemptions are discussed at page 562.

B. *The South Carolina Inheritance Tax*

1. Types of Death Taxes

Death taxes are of two types, inheritance taxes and estate taxes.⁴⁸⁸ An inheritance tax differs from an estate tax in that an inheritance tax is imposed upon a beneficiary's privilege of receiving property from a decedent, while an estate tax is a tax upon the decedent's privilege of giving his property at his death to another.⁴⁸⁹ The federal death tax⁴⁹⁰ is an estate tax. The State of South Carolina has both an inheritance tax⁴⁹¹ and an estate tax.⁴⁹²

488. LOWNDES AND KRAMER, *FEDERAL ESTATE AND GIFT TAXES* at 4 (1956).

489. *Ibid.* See *Simmons v. S. C. Tax Commission*, 134 S. C. 261, 132 S. E. 37 (1926).

490. INT. REV. CODE OF 1954, Subtitle B, Chap. 11 (1954).

491. CODE OF LAWS OF SOUTH CAROLINA § 65-7 (1952).

492. CODE OF LAWS OF SOUTH CAROLINA § 65-8 (1952).

2. Transfers and Interest Subject to Tax

The South Carolina inheritance tax is imposed in the following cases:

(1) Upon transfers by will or intestacy of the property of a decedent who dies while a resident of South Carolina.⁴⁹³

(2) Upon transfers by will or intestacy of the property within South Carolina of a decedent who dies while a nonresident of South Carolina.⁴⁹⁴ This outline will not discuss the taxing of estates of nonresident decedents.

(3) Upon transfers of property by a resident of South Carolina, or of property within South Carolina by a nonresident, by deed or gift made in contemplation of the death of the transferor, or intended to take effect in possession or enjoyment at or after such death.⁴⁹⁵

Direct or indirect transfers of property between parties related by blood or marriage, made within three years prior to death of the transferor without an adequate valuable consideration, are *prima facie* construed to have been made in contemplation of death, unless the taxpayer establishes facts to the contrary.⁴⁹⁶ For a fuller discussion of what is meant by a conveyance in contemplation of death, see page 568.

Generally speaking, a transfer is considered one intended to take effect in possession or enjoyment at or after the transferor's death when the transferee is not immediately and unqualifiedly entitled to possession or enjoyment of the thing given, but will become so only at a time determined by reference to the transferor's death.⁴⁹⁷ For example, suppose a farmer gives land to his son by a deed which reserves to the farmer the use of the land for his life. At the farmer's death the land is a part of his estate for inheritance tax purposes, since the gift to the son was intended to take effect in possession at the death of the father.

(4) The nature of a power of appointment was explained on page 502. Although no statute⁴⁹⁸ expressly so provides, it seems that a gift of a general power to appoint an interest in prop-

493. CODE OF LAWS OF SOUTH CAROLINA § 65-461 (1) (1952).

494. CODE OF LAWS OF SOUTH CAROLINA § 65-461 (2) (1952).

495. CODE OF LAWS OF SOUTH CAROLINA § 65-461 (3) (1952).

496. CODE OF LAWS OF SOUTH CAROLINA § 65-464 (1952), as amended, 49 Stat. 548 (1955) and 50 Stat. 1680 (1958).

497. See cases cited in Annot., 167 A. L. R. 438 (1947), and earlier annotations there cited.

498. CODE OF LAWS OF SOUTH CAROLINA §§ 65-461, 462 (1952), would seem to be the only sections conceivably having any relevancy.

erty subjects the donor's estate to the same tax liability that would have been incurred had the donor made an outright gift of the interest to the donee of the power.⁴⁹⁹ Thereafter, when the donee either exercises the general power by deed or will, or when he fails to exercise it within the time provided for its exercise, the property is taxed again, this time in the estate of the donee, to the person entitled thereto by reason of the donee's exercise or failure to exercise the general power.⁵⁰⁰ While the statute makes no distinction between general and special powers of appointment, the writer understands that in cases which have arisen, the Tax Commission has imposed but one inheritance tax upon dispositions made subject to a special power of appointment⁵⁰¹ (instead of the two taxes imposed in the case of a general power).

(5) Suppose that real or personal property is held in the joint names of a decedent and another so that the entire property will pass to the survivor,⁵⁰² or is deposited in a bank or other institution in the joint names of a decedent and another and payable to either or the survivor. In such case the entire property on deposit will be taxed as a transfer by the decedent to the survivor, excepting therefrom such part as may be shown to have originally belonged to the surviving joint tenant or depositor, or to have been bought from the decedent

499. The writer understands that this is the position taken by the Tax Commission. No express South Carolina case authority has been found. See Randall, *Survey of Tax Cases*, 12 S. C. L. Q. 146 (1959), discussing *Montague v. S. C. Tax Commission*, 233 S. C. 110, 103 S. E. 2d 769 (1958); Bruton, *Estate Planning*, 2 S. C. L. Q. 145 (1949). See generally 28 AM. JUR. *Inheritance, Estate, and Gift Taxes* § 213 (1959).

500. CODE OF LAWS OF SOUTH CAROLINA § 65-462 (1952). The writer understands the position of the Tax Commission to be that an inter vivos exercise of a general power of appointment subjects the appointed assets to tax liability in the estate of the donee. See *In re Wendel*, 223 N. Y. 433, 119 N. E. 879, 5 A. L. R. 177 (1918), which construes a similar New York Statute. This case is cited in *Weston v. S. C. Tax Commission*, 212 S. C. 530, 48 S. E. 2d 504 (1948). As to the effect of a testamentary exercise of a general power of appointment, see *Weston v. S. C. Tax Commission*, *supra*. As to the effect of a failure to exercise a general power, see *Montague v. S. C. Tax Commission*, 233 S. C. 110, 103 S. E. 2d 769 (1958). However, it seems that the donee's inter vivos release of a general power of appointment frees the released assets from inheritance tax liability in the donee's estate. *Weston v. S. C. Tax Commission*, *supra*.

501. Which tax was computed on the basis of the tax rate applicable to the gift in default of appointment, and collected in the settlement of the inheritance tax liability of the donor's estate.

502. It seems that a tenancy in common in land with benefit of survivorship in the decedent and another is within the purview of this section and the equivalent federal estate tax section, INT. REV. CODE OF 1954 § 2040. See Note, 11 S. C. L. Q. 247 (1959), discussing tax implications of *Davis v. Davis*, 223 S. C. 182, 75 S. E. 2d 46 (1953).

for not less than its fair market value.⁵⁰³ If any portion of the property was bought from the decedent for less than its fair market value, for tax purposes the amount of the consideration so paid will be deducted from the value of the property.⁵⁰⁴ Joint interests under the federal estate tax are discussed at page 568.

3. Exemptions Allowed

The inheritance tax is imposed only upon the transfer of a "beneficial interest", which means the net value of property passing to a beneficiary after deducting all valid and subsisting mortgages, liens or other debts due thereon by the deceased.⁵⁰⁵

(1) Beneficial interests valued at \$10,000 or less passing to a husband or wife are exempt from taxation, and the tax is levied only on any excess of \$10,000 received by the spouse.⁵⁰⁶ In addition, a marital deduction not to exceed 50 per cent of the adjusted gross estate, including the specific exemption of \$10,000, is allowed on any interest passing to the spouse which thereafter will be includible in the spouse's gross estate upon his or her subsequent death.⁵⁰⁷ The inheritance tax marital deduction is similar to the one allowed under the federal estate tax, and is discussed on page 570 of this bulletin. Briefly, the marital deduction allows a surviving husband or wife to receive an absolute transfer of up to one half of the decedent's net estate free of the burden of any inheritance tax.

(2) A minor child of the decedent has an exemption of \$7,500 and the tax is levied on any excess over \$7,500 received by such child.⁵⁰⁸ In the case of an adult child, or a father or mother of the decedent, an exemption of \$5,000 is allowed,⁵⁰⁹ while a grandchild is allowed an exemption of \$2,500.⁵¹⁰ For inheritance tax purposes a legally adopted child is regarded as a natural child.⁵¹¹

503. CODE OF LAWS OF SOUTH CAROLINA § 65-463 (1952), as amended, 49 Stat. 566 (1955).

504. *Ibid.*

505. CODE OF LAWS OF SOUTH CAROLINA § 65-451 (2) (1952).

506. CODE OF LAWS OF SOUTH CAROLINA § 65-468 (1) (1952).

507. CODE OF LAWS OF SOUTH CAROLINA § 65-468.1 (1952), enacted, 49 Stat. 573 (1955).

508. CODE OF LAWS OF SOUTH CAROLINA § 65-468 (2) (1952).

509. CODE OF LAWS OF SOUTH CAROLINA § 65-468 (3) (1952).

510. CODE OF LAWS OF SOUTH CAROLINA § 65-468 (4) (1952), as amended, 49 Stat. 560 (1955).

511. CODE OF LAWS OF SOUTH CAROLINA § 65-451 (1) (1952).

(3) In the case of beneficial interests passing to a grandfather or more remote ancestor, or a great grandchild or more remote descendant, or to a brother, sister, uncle, aunt, or nephew, or the wife or widow of a son, or the husband of a daughter, an exemption of \$500 for each such person is allowed.⁵¹²

(4) In the case of beneficial interests passing to persons other than those mentioned in (1), (2) & (3) above, or to corporations, an exemption of \$200 is allowed.⁵¹³

(5) Gifts for educational, religious and charitable or public purposes are not subject to the inheritance tax.⁵¹⁴

4. Property Not Taxed More Than Once A Year

Inheritance taxes are not assessed or collected against the same estate or property, real or personal, more often than once in a period of 12 months, regardless of the number of times it may have been inherited in such 12 month period.⁵¹⁵

5. Tax Rates

A beneficial interest in excess of the allowable exemption is taxed as follows:

(1) In the case of a husband, wife, child, grandchild, father or mother, at the rate of 1 per cent on any taxable amount up to and including the sum of \$20,000, 2 per cent on all sums in excess of \$20,000 and not exceeding \$40,000, and 3 per cent on sums in excess of \$40,000 and not exceeding \$80,000, 4 per cent on sums in excess of \$80,000 and not exceeding \$150,000, 5 per cent on sums in excess of \$150,000 and not exceeding \$300,000, and 6 per cent on all sums in excess of \$300,000.⁵¹⁶

(2) In the case of a grandparent or more remote ancestor, or a greatgrandchild or more remote descendant, or a brother, sister, uncle, aunt, niece or nephew, or the wife or widow of a son, or the husband of a daughter, at the rate of 2 per cent on taxable amounts up to and including \$20,000, 3 per cent on sums in excess of \$20,000, but not exceeding \$40,000, 4 per cent on sums in excess of \$40,000 but not exceeding \$80,000, 5 per cent on sums in excess of \$80,000 and not exceeding \$150,000, 6 per cent on sums in excess of \$150,000 and

512. CODE OF LAWS OF SOUTH CAROLINA § 65-470 (1952).

513. CODE OF LAWS OF SOUTH CAROLINA § 65-472 (1952).

514. CODE OF LAWS OF SOUTH CAROLINA § 65-473 (1952).

515. CODE OF LAWS OF SOUTH CAROLINA § 65-478 (1952).

516. CODE OF LAWS OF SOUTH CAROLINA § 65-467 (1952).

not exceeding \$300,000 and 7 per cent on all sums in excess of \$300,000.⁵¹⁷

(3) In the case of a person other than one mentioned in (1) and (2) above, or a corporation, at the rate of 4 per cent on taxable amounts up to and including \$20,000, 6 per cent on sums in excess of \$20,000 and not exceeding \$40,000, 8 per cent on sums in excess of \$40,000 and not exceeding \$80,000, 10 per cent on sums in excess of \$80,000 and not exceeding \$150,000, 12 per cent on sums in excess of \$150,000 and not exceeding \$300,000 and 14 per cent on all sums in excess of \$300,000.⁵¹⁸

6. Procedure

a. Assessment and Payment of Tax

Within 30 days after certain papers essential to the administration of a decedent's estate have been filed with him, the probate judge sends copies thereof, including a copy of the estate inventory and appraisal (see page 551), to the South Carolina Tax Commission,⁵¹⁹ hereinafter referred to as the Commission. If an inventory and appraisal is not filed in the probate court, or if the Commission is not satisfied with such inventory and appraisal, the Commission may employ its own appraiser to make an inventory and appraisal of the estate.⁵²⁰

The Commission determines the amount of all inheritance taxes due and payable, and certifies the amount thereof to the executor or administrator if any; otherwise to the person by whom the tax is payable.⁵²¹ The tax is assessed upon the fair market value of the property at the time of the decedent's death.⁵²² The Commission's determination of the fair market value is final unless an appeal taken therefrom to the circuit court of the county in which the estate is being administered within thirty days after notice of the Commission's appraisal, results in a reduction of the valuation.⁵²³ An appeal from the assessment of tax by the Commission may be taken to the

517. CODE OF LAWS OF SOUTH CAROLINA § 65-469 (1952).

518. CODE OF LAWS OF SOUTH CAROLINA § 65-471 (1952).

519. CODE OF LAWS OF SOUTH CAROLINA § 65-501 (1952).

520. CODE OF LAWS OF SOUTH CAROLINA § 65-507 (1952), as amended, 49 Stat. 548 (1955).

521. CODE OF LAWS OF SOUTH CAROLINA § 65-506 (1952).

522. CODE OF LAWS OF SOUTH CAROLINA § 65-508 (1952), as amended, 49 Stat. 548 (1955).

523. CODE OF LAWS OF SOUTH CAROLINA § 65-508, as amended, 49 Stat. 548 (1955), § 65-509 (1952).

South Carolina Supreme Court within thirty days after notice of the assessment made by the Commission.⁵²⁴

Whenever a specific bequest of household furniture, wearing apparel, personal ornaments or similar articles of small value is subject to an inheritance tax, the Commission, in its discretion, may abate such tax if, in its opinion, the tax is not of sufficient amount to justify the labor and expense of its collection.⁵²⁵

Inheritance taxes are due and payable to the Commission by the executors, administrators, or trustees at the expiration of one year after the date of their qualifications.⁵²⁶ If the executor or administrator has been ordered by a court to retain funds to satisfy a creditor's claim, or if litigation is pending as to the distribution or ownership of any part of the estate, the payment of the tax may be suspended to await the payment of such claim or litigation.⁵²⁷ In any event, if the taxes are not paid within one year from the date of qualification of the personal representative, interest at the rate of ten per cent per annum shall be charged and collected.⁵²⁸ Such taxes and the interest due thereon constitute a lien on the property subject to the tax.⁵²⁹

When the Commission has determined the amount of any tax due it certifies such amount, and when the same has been paid, issues a receipt to the executor, administrator or other interested party paying it.⁵³⁰ The Commission's certificate of the amount of the tax and its receipt is conclusive as to the payment of the tax to the extent of such certification.⁵³¹ But such a certificate is not a release of the lien of the State upon any property which was not included in the inventory and appraisal of the estate, and such lien continues as to any property not so included until the tax and penalty have been paid.⁵³²

b. Duties of Executor, Administrator or Trustee

An executor, administrator or trustee holding property subject to tax must not deliver the property to the person en-

524. CODE OF LAWS OF SOUTH CAROLINA § 65-510 (1952).

525. CODE OF LAWS OF SOUTH CAROLINA § 65-479 (1952).

526. CODE OF LAWS OF SOUTH CAROLINA § 65-511 (1952).

527. *Ibid.*

528. *Ibid.*

529. *Ibid.*

530. CODE OF LAWS OF SOUTH CAROLINA § 65-526 (1952).

531. CODE OF LAWS OF SOUTH CAROLINA § 65-523 (1952).

532. *Ibid.*

titled thereto without first deducting the tax or collecting it from that person.⁵³³ In the case of a specific bequest of personal property other than money, if the legatee fails to pay the tax upon demand, the executor or trustee is authorized, upon such notice as the probate court may direct, to sell such property, or, if it can be divided, such portion thereof as may be necessary, and deduct the tax from the proceeds of sale and account to the legatee for any balance of such proceeds in lieu of the property.⁵³⁴

The executor or administrator must collect the inheritance tax due upon land from the heirs or devisee entitled thereto. If the tax is not paid by the heirs or devisee, the probate court may order the land sold in the same manner that it may be sold for payment of debts.⁵³⁵

Where less than fee interests are given to one or more beneficiaries with remainder to others (see page 499 for a discussion of remainders), the executor must collect the tax due upon both interests, if necessary by selling all or part of the property pursuant to authorization by the probate court.⁵³⁶

No final account or discharge of an executor, administrator, or trustee is allowed until after filing of the Commission's certificate to the effect that all inheritance taxes imposed and already payable upon property or interests therein of the estate included in such account have been paid, and that all taxes which may become due on property or interests therein to be included in such account have been paid or settled.⁵³⁷

In its discretion the Commission may extend the time for payment of the tax in cases where the settlement of the estate is being delayed because of such non-payment.⁵³⁸

c. Duty of Depositories Holding Assets of a Decedent

Safe deposit companies, banks, and other institutions possessing or controlling securities, deposits, or other assets for a decedent or for a decedent and another jointly, are forbidden to deliver or transfer such assets to the decedent's personal representative, or to the surviving joint depositor, without first complying with certain measures designed to insure

533. CODE OF LAWS OF SOUTH CAROLINA § 65-512 (1952).

534. CODE OF LAWS OF SOUTH CAROLINA § 65-513 (1952).

535. CODE OF LAWS OF SOUTH CAROLINA §§ 65-514, 517, 518 (1952).

536. CODE OF LAWS OF SOUTH CAROLINA §§ 65-513, 514, 517, 518 (1952).

537. CODE OF LAWS OF SOUTH CAROLINA § 65-522 (1952).

538. CODE OF LAWS OF SOUTH CAROLINA § 65-524 (1952).

the payment of any inheritance tax due on the assets so held.⁵³⁹

C. *The South Carolina Estate Tax*

The South Carolina estate tax⁵⁴⁰ is designed to take advantage of federal estate tax act provisions⁵⁴¹ which under some circumstances permit a state to collect from the federal government a portion of the federal tax imposed upon a decedent's estate. When applicable, the South Carolina estate tax does not increase the total tax burden upon a decedent's estate, but only diverts a portion of the tax paid from the federal to the South Carolina treasury.

1. Procedure

The legal representative of the estate must file with the South Carolina Tax Commission a duplicate of the return which he is required to make to the federal authorities, for the purpose of having the estate tax determined.⁵⁴² The South Carolina estate tax is payable at the same time the federal estate tax is payable.⁵⁴³ Procedures for collection of the inheritance tax apply to the South Carolina estate tax.⁵⁴⁴

D. *The Federal Estate Tax*

The federal government imposes an estate tax upon the taxable estate of a decedent.⁵⁴⁵ The tax is a progressive one, the rate of which varies from 3 per cent to 77 per cent.⁵⁴⁶ The value of the taxable estate is determined by deducting from the value of the gross estate an exemption in amount \$60,000, plus certain other allowable deductions.⁵⁴⁷

1. The Gross Estate

The value of a decedent's gross estate includes the value at the time of his death of his inheritable property⁵⁴⁸ plus the value of any of certain interests he may have transferred

539. CODE OF LAWS OF SOUTH CAROLINA §§ 65-504, 505 (1952).

540. CODE OF LAWS OF SOUTH CAROLINA § 65-8 (1952).

541. INT. REV. CODE OF 1954, § 2011.

542. CODE OF LAWS OF SOUTH CAROLINA § 65-553 (1952), as amended, 50 Stat. 1681 (1958).

543. CODE OF LAWS OF SOUTH CAROLINA § 65-552 (1952).

544. CODE OF LAWS OF SOUTH CAROLINA § 65-553 (1952).

545. INT. REV. CODE OF 1954, § 2001.

546. *Ibid.*

547. INT. REV. CODE OF 1954, §§ 2051, 2052.

548. INT. REV. CODE OF 1954, § 2033. Estates for the decedent's own life are not included in the gross estate. *Helvering v. Rhodes*, 117 F. 2d 509 (8th Cir. 1941), *affirming* 41 B. T. A. 62 (1940).

during his life. Among such transfers included in the gross estate are:

(1) Dower interest of the decedent's wife.⁵⁴⁹ This means that the full value of the decedent's land is included in his gross estate, without deduction of the value of the dower interest of the decedent's widow.⁵⁵⁰

(2) Gifts made in contemplation of death. A gift made within three years of the decedent's death is presumed to have been made in contemplation of death, unless the contrary is shown. A gift made more than three years before the decedent's death is conclusively regarded as one not made in contemplation of death.⁵⁵¹ The definition of the phrase "contemplation of death" given in the Federal Estate Tax Regulations is set out in the footnote below.⁵⁵²

(3) Property transferred by the decedent during his life, but in which he reserved either a life interest⁵⁵³ or certain other interests.⁵⁵⁴ The governing code sections are far reaching in scope, and have given rise to much litigation.⁵⁵⁵ One common example of such a transfer is a gift of land with the use thereof reserved to the donor for his life.

(4) Certain Annuities.⁵⁵⁶

(5) Real or personal property which at a decedent's death was concurrently owned by him and another with a right of survivorship, is included in the decedent's gross estate (except such part thereof as may be shown to have originally belonged to the survivor, and never to have been acquired by him from the decedent for less than an adequate and full consideration

549. INT. REV. CODE OF 1954, § 2034.

550. Treas. Reg. § 20.2034-1.

551. INT. REV. CODE OF 1954, § 2035 (b).

552. Treas. Reg. § 20.2035-1 (c) Definition. The phrase "in contemplation of death," as used in this section does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any motive associated with death. The bodily and mental condition of the decedent and all attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

553. INT. REV. CODE OF 1954, § 2036.

554. INT. REV. CODE OF 1954, §§ 2037, 2038.

555. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES at 84 (1956).

556. INT. REV. CODE OF 1954, § 2039.

in money or money's worth).⁵⁵⁷ Examples would include bank or savings and loan accounts payable to the decedent or to another or the survivor, and United States Savings Bonds registered in the names of the decedent and another as co-owners.⁵⁵⁸ Concurrent interests with right of survivorship were earlier discussed at pages 558 and 561.

(6) Property subject to certain powers of appointment which the decedent had at his death, or which, under some circumstances, he had released during his life.⁵⁵⁹ This means that under some circumstances property which was never owned by a decedent may be included in his gross estate because of his legal power (called a power of appointment) to affect another's ownership of such property. Powers of appointment were earlier discussed at page 502, and their taxation under the South Carolina inheritance tax at page 560.

(7) Proceeds of life insurance on the decedent's life payable to his estate, or if payable to other beneficiaries, with respect to which he possessed any of the incidents of ownership at the time of his death.⁵⁶⁰ The term "incidents of ownership" includes powers to change the beneficiary, or to surrender, cancel, assign or pledge the policy, or borrow from the insurer on the cash surrender value thereof.⁵⁶¹ The applicability of death taxes to the proceeds of insurance on a decedent's life was earlier discussed at page 558.

2. Exemption and Deductions

The value of the taxable estate is determined by deducting from the value of the gross estate the following:⁵⁶²

(1) An exemption of \$60,000.⁵⁶³ Whenever a decedent's gross estate is less than \$60,000, therefore, no federal estate tax is payable, nor is it necessary to file a preliminary notice or a federal estate tax return (see page 571).

(2) Funeral and administrative expenses, claims against the estate if paid, and unpaid mortgages, in addition to certain other items.⁵⁶⁴

(3) Losses incurred during the settlement of the estate by reason of fire, storm, shipwreck, or other casualty, or from

557. INT. REV. CODE OF 1954, § 2040.

558. Treas. Reg. § 20.2040-1 (b). Mim. 5202, 1941-2 CUM. BULL. 241.

559. INT. REV. CODE OF 1954, § 2041.

560. INT. REV. CODE OF 1954, § 2042.

561. Treas. Reg. § 20.2042-1 (c) (2).

562. INT. REV. CODE OF 1954, § 2051.

563. INT. REV. CODE OF 1954, § 2052.

564. INT. REV. CODE OF 1954, § 2053.

theft, when such losses are not compensated for by insurance or otherwise.⁵⁶⁵

(4) Gifts for public, charitable and religious uses, made either by will or by other transfer included in the gross estate for tax purposes.⁵⁶⁶

(5) Marital deduction — Generally speaking, the share of the gross estate taken by the surviving spouse, to the extent that the spouse's share does not exceed one half the value of the adjusted gross estate.⁵⁶⁷ The adjusted gross estate is the gross estate less the deductions mentioned in (2) and (3) above.⁵⁶⁸ To illustrate very generally,⁵⁶⁹ suppose that a decedent's adjusted gross estate is \$120,000. If \$60,000, one half the adjusted gross estate, passes to the surviving spouse, the estate will not have to pay a federal estate tax, since \$120,000 (the adjusted gross estate) minus \$60,000 (the marital deduction) leaves \$60,000, which is not in excess of the \$60,000 exemption. On the other hand, if the amount passing to the surviving spouse had been \$40,000 instead of \$60,000, the estate would have been taxed on \$20,000, since \$120,000 (the adjusted gross estate) minus \$40,000, (the marital deduction) leaves \$80,000, which is \$20,000 (the amount subject to tax) in excess of the \$60,000 exemption. Under present rates, a federal estate tax in amount \$1600 would be payable on a taxable estate of \$20,000.⁵⁷⁰

In the case above put, suppose that the decedent was a farmer survived by a wife and two children. If he died intestate, the widow would take \$40,000, one third of the adjusted gross estate, and each of the children would take a like sum.⁵⁷¹ As explained above, the estate would be taxed on \$20,000, the amount in excess of the sum of the marital deduction (\$40,000) plus the \$60,000 exemption.

However, if instead of dying intestate the farmer had willed \$60,000 to his widow and the other one half of his adjusted gross estate to his children, no tax would be owed, since

565. INT. REV. CODE OF 1954, § 2054.

566. INT. REV. CODE OF 1954, § 2055. See LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* at 358 (1956).

567. INT. REV. CODE OF 1954, § 2056.

568. INT. REV. CODE OF 1954, § 2056 (c) (2).

569. All marital deduction illustrations given are simplified in that the effect of estate and inheritance taxes payable out of property passing to the spouse is ignored. INT. REV. CODE OF 1954, § 2056 (b) (4) (A).

570. INT. REV. CODE OF 1954, § 2001.

571. See p. 526 *supra*, where the distribution of an intestate's estate is explained.

there would be no amount in excess of the sum of the marital deduction (\$60,000) plus the \$60,000 exemption. When considering this last illustration, however, a farmer must bear in mind that minimization of taxes is only a secondary goal of estate planning, and in some cases even though it increases the tax burden, more important family considerations make it advisable to give the widow an interest less in value than the permissible marital deduction.

The marital deduction cannot exceed one half of the adjusted gross estate. Thus if the adjusted gross estate is \$140,000, of which \$90,000 is given the surviving spouse, the amount which is taxable is calculated as follows: \$140,000 (the adjusted gross estate) minus \$70,000 (one half the adjusted gross estate, which is the maximum marital deduction) leaves \$70,000, which is \$10,000 (the amount subject to tax) in excess of the \$60,000 exemption.

If an interest given the spouse is a terminable one, it does not qualify for the marital deduction.⁵⁷² For estate tax purposes an interest given the spouse is a terminable one when the decedent has given another person some possible future right to possess or enjoy the property given the spouse.⁵⁷³ For example, if a farmer devises his farm to his wife for her life with remainder to his children, the life estate given the wife is a terminable one, the value of which cannot be included in the marital deduction. An example of still another kind of terminable interest which does not qualify for the marital deduction is an annuity purchased for the spouse pursuant to the decedent's testamentary direction.⁵⁷⁴

3. Procedure

a. Filing of Preliminary Notice

If a decedent's gross estate exceeds a value of \$60,000 at date of death, a preliminary notice is required to be filed with the District Director.⁵⁷⁵ If an executor or administrator has qualified within two months after the decedent's death, he must file the notice within two months after his qualification.⁵⁷⁶ If no executor or administrator has qualified, the no-

572. INT. REV. CODE OF 1954, § 2056 (a), (b).

573. INT. REV. CODE OF 1954, § 2056 (b) (1) (A), (B).

574. INT. REV. CODE OF 1954, § 2056 (b) (1) (C).

575. INT. REV. CODE OF 1954, §§ 6036, 6091 (a); Treas. Reg. §§ 20.6036-1 (a), 20.6091-1.

576. Treas. Reg. §§ 20.6036-1 (b), 20.6071-1.

tice must be filed within two months after the decedent's death, by every person in actual or constructive possession of any property of the decedent.⁵⁷⁷

b. Filing of Return and Payment of Tax

If the gross estate exceeds a value of \$60,000 at date of death, a return must be filed even though no tax is due because of marital or other deductions.⁵⁷⁸ The return must be filed and any tax due paid within 15 months after the date of death.⁵⁷⁹ If payment of the tax when due will result in unusual hardship to the estate, the time for payment may be extended for a reasonable period not in excess of 10 years.⁵⁸⁰

c. Liability for Payment of Tax

Ordinarily the estate tax is paid by the executor or administrator⁵⁸¹ out of assets of the estate, but if there is no qualified executor or administrator any person in actual or constructive possession of any property of the decedent is liable for the entire tax to the extent of the value of such property.⁵⁸² If the tax is not voluntarily paid the federal government has various liens⁵⁸³ and rights of suit⁵⁸⁴ to enforce the payment thereof.

d. Allocation of Death Tax Burdens⁵⁸⁵

A testator may direct in his will how the burden of paying death taxes shall be borne by his beneficiaries. Although such a direction usually is more important in the case of a large estate, a failure so to provide when disposing of any estate may result in hardship to some beneficiaries, as well as in the imposition of a larger than necessary tax burden.⁵⁸⁶ Regardless

⁵⁷⁷ *Ibid.*

⁵⁷⁸ INT. REV. CODE OF 1954, § 6018; Treas. Reg. § 20.6018-1.

⁵⁷⁹ INT. REV. CODE OF 1954, §§ 6075 (a), 6151 (a); Treas. Reg. §§ 20.6075-1, 20.6151-1.

⁵⁸⁰ INT. REV. CODE OF 1954, § 6161 (a) (2); Treas. Reg. § 20.6161-1 (a).

⁵⁸¹ INT. REV. CODE OF 1954, § 2002.

⁵⁸² INT. REV. CODE OF 1954, §§ 2002, 2203; Treas. Reg. §§ 20.2002-1, 20.2203-1.

⁵⁸³ INT. REV. CODE OF 1954, §§ 6321 thru 6323, 6324 (a).

⁵⁸⁴ See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES at 618 n. 108, 109 (1956) as to the personal liability, under some circumstances, of the personal representative and of fiduciaries and transferees.

⁵⁸⁵ See generally LOWNDES & KRAMER, *op. cit. supra* n. 1, §§ 17, 18; CASNER, ESTATE PLANNING 896-99 (2d ed. 1956).

⁵⁸⁶ For an example of the consequences of a failure so to provide in a will, see *Gaither v. U. S. Trust Co. of New York*, 230 S. C. 568, 97 S. E. 2d 24 (1957), reviewed 10 S. C. L. Q. 131 (1957). Consequences in the case of an intestacy are considered in *Pitts v. Hamrick*, 228 F. 2d 486 (4th Cir. 1955), reviewed 9 S. C. L. Q. 145 (1956). And see *Myers v. Sinkler*, 235

of the size of his estate, therefore, this is a matter for the farmer to consider when he is planning his estate with his lawyer.

E. *The Federal Gift Tax*

Subject to limitations to be discussed, the federal government imposes a tax on the aggregate sum of gifts made by an individual during the calendar year.⁵⁸⁷ The tax is a progressive one, the rate of which varies from 2 $\frac{1}{4}$ per cent to 57 $\frac{3}{4}$ per cent.⁵⁸⁸ The donor is primarily liable for payment of the tax.⁵⁸⁹ However, if he fails to pay it when due, the donee is personally liable therefor,⁵⁹⁰ and there is also a lien on the donated property for the amount of the tax.⁵⁹¹

The tax applies to a gift in trust or otherwise, whether direct or indirect, and whether the property is real or personal, tangible or intangible.⁵⁹² The tax also is applicable to a transfer to the extent that it was made for less than an adequate and full consideration in money or money's worth,⁵⁹³ unless such transfer was a sale or exchange in the course of a bona fide business transaction.⁵⁹⁴

1. The Annual Exclusion

As a rule,⁵⁹⁵ the first \$3,000 of a gift made to any person is excluded when computing the taxable gifts of a donor.⁵⁹⁶ This means every calendar year a donor may give \$3,000 per person to as many persons as he wishes without having to pay a gift tax. However, if in a calendar year he gives more than \$3,000 to any one person, the amount in excess of \$3,000 will be taxed, unless the donor applies his specific exemption against the excess over \$3,000.⁵⁹⁷

S. C. 162, 110 S. E. 2d 241 (1959), wherein death taxes were apportioned between the probate estate and a nonprobate trust estate of a decedent.

587. INT. REV. CODE OF 1954, § 2501.

588. INT. REV. CODE OF 1954, § 2502.

589. INT. REV. CODE OF 1954, § 2502 (d); Treas. Reg. 25.2502-2; LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* at 635 (1956).

590. INT. REV. CODE OF 1954, § 6324 (b); Treas. Reg. § 301.6324-1.

591. *Ibid.*

592. INT. REV. CODE OF 1954, § 2511.

593. INT. REV. CODE OF 1954, § 2512 (b).

594. Treas. Reg. § 25.2512-8; LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* at 628 (1956).

595. An exception is made in the case of a gift of a future rather than a present interest. INT. REV. CODE OF 1954, § 2503 (b) (c). See p. 499 *supra*, for a simplified discussion of future interests.

596. INT. REV. CODE OF 1954, § 2503 (b).

597. INT. REV. CODE OF 1954, §§ 2503 (b), 2521.

2. The Specific Exemption

Every person has a specific exemption of \$30,000, claimable when he sees fit, against gifts he makes in excess of \$3,000 per year per person.⁵⁹⁸ The specific exemption is cumulative rather than annual, however, and once the donor has elected to use up his entire \$30,000 exemption, gifts he thereafter makes are taxable to the extent that they are in excess of \$3,000 per year per person.⁵⁹⁹ Unlike the annual exclusion, the exemption may be applied against gifts of future as well as present interests.⁶⁰⁰

3. Gifts To a Spouse (The Marital Deduction)

As a rule,⁶⁰¹ when a donor makes a gift to his or her spouse, one half the value of the gift may be deducted when computing the donor's taxable gifts.⁶⁰² This means that in any year a husband may give \$6,000 to his wife, or the wife \$6,000 to her husband, without incurring a tax or reducing the amount of the donor's specific exemption. Furthermore, to the extent that the donor's specific exemption has not already been reduced, the exemption may be used to make tax free gifts to the spouse in excess of \$6,000 per year. This means that if the donor's \$30,000 exemption has not already been used in part, if desired the exemption may be exhausted to make \$66,000 worth of tax free gifts to the spouse in a calendar year.

4. Gifts by Husband or Wife to a Third Party (Split Gifts)

If both husband and wife formally consent,⁶⁰³ a gift either makes to a third party will be treated as though each of them made one half of the gift.⁶⁰⁴ This means that if both spouses consent, one of them may give as much as \$6,000 per year to

598. INT. REV. CODE OF 1954, § 2521; Treas. Reg. § 25.2521-1; LOWNDES & KRAMER, *op. cit. supra* note 589, at 631.

599. *Ibid.*

600. *Ibid.*

601. There are two exceptions: (1) gifts of community property and (2) gifts of terminable interests, neither of which qualifies for the marital deduction. Community property as defined in INT. REV. CODE OF 1954, § 2523 (f) does not exist in South Carolina. Generally speaking, for gift tax purposes the interest of a donee is a terminable one when the donor either has retained in himself or given to a third person some possible future right to possess or enjoy the donated property, or has retained in himself a power to appoint a possible future right to possess or enjoy the donated property. INT. REV. CODE OF 1954, § 2523 (b). See LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES at 796 (1956).

602. INT. REV. CODE OF 1954, § 2523.

603. As to the manner and time of signifying such consent, see INT. REV. CODE OF 1954, § 2513 (b). LOWNDES & KRAMER, *op. cit. supra* note 601, at 808.

604. INT. REV. CODE OF 1954, § 2513 (a) (1).

a third party without paying any tax or reducing the donor's specific exemption of \$30,000. Furthermore, to the extent that both spouses have their specific exemptions available, a larger gift may be made without tax liability. For example, if each spouse has the full \$30,000 exemption, with the consent of both one can make a tax free \$66,000 gift to a third party, since the sum of two \$30,000 exemptions plus two \$3,000 annual exclusions equals \$66,000.

5. Charitable and Similar Gifts Deductible

In computing the donor's taxable gifts all gifts to and for the use of governmental, charitable and religious organizations are deductible.⁶⁰⁵

6. Filing of Return and Payment of Tax

A donor must file a gift tax return if within a calendar year he gives any future interest,⁶⁰⁶ regardless of value, or he gives to any one donee a present interest or interests worth more than \$3,000.⁶⁰⁷ A return must be filed even if no tax is due because of the specific exemption or allowable deductions.⁶⁰⁸ The return must be filed⁶⁰⁹ and the tax paid⁶¹⁰ on or before April 15 following the close of the calendar year for which the gifts were made.

IX. PLANNING THE FARMER'S ESTATE

The goal of estate planning is the disposition of a person's assets in the manner that best accomplishes the objectives he seeks for his beneficiaries. Since the financial and family situation of no two persons is identical, it follows that an estate plan is a highly personal thing which must be tailored to meet the needs of the individual. Accordingly, the purpose of this discussion is not to set out certain definite and rigid plans, one of which may be selected by a farmer for the arrangement of his own affairs. Instead, its aim is merely to point out a method which will help him analyze his situation and determine in his own mind a general solution to his planning problems. Once the farmer has assembled necessary factual information and thought out his general objec-

605. INT. REV. CODE OF 1954, § 2522.

606. See note 595 *supra*.

607. INT. REV. CODE OF 1954, § 6019 (a).

608. *Ibid.*

609. INT. REV. CODE OF 1954, § 6075 (b).

610. INT. REV. CODE OF 1954, § 6151 (a).

tives, it then is time for him to seek expert advice in the completion and implementation of his plan.

As a rule, a competent lawyer is the person best qualified to advise the farmer how to arrange his affairs. This is not to suggest that every lawyer is capable of advising on all aspects of estate planning. However, by means of his general training and his position in the community, a lawyer can obtain from estate planners and related specialists, both lawyer and non-lawyer, the services the farmer needs. Just as the patient of the general practitioner of medicine through consultation has access to the skills of the various medical specialists, so a lawyer can obtain for the farmer expert and impartial solutions to the farmer's estate planning problems.

A farmer may start his planning process by getting down on paper an estimate of his present financial situation. To do this he should total the present fair market value of all his material assets, including land, farm animals, and machinery, automobile, household furniture, bank or savings and loan accounts, stocks, bonds, etc. as well as the value of life insurance payable at his death. Also, when appraising his assets the farmer should not overlook the amount of social security benefits which will be paid to his dependents after his death. Information as to these benefits (which are exempt from both federal and state income and death taxes) may be obtained from the nearest Social Security District Office.

Once the farmer's assets have been determined, the sum of his liabilities should likewise be totalled. Included among his liabilities are the amounts due on mortgages on his land, machinery, automobile or other property, as well as any other debts which he owes. There are other expenses which his estate must bear at his death, which during his life can only be estimated. Among such expenses are medical and hospital bills which will be incurred during his last illness, the cost of his burial, and the necessary expenses of administering his estate. Also, depending upon the size of his estate and the disposition of it which the farmer desires, it may be that both state and federal death taxes will have to be paid. As was discussed at page 557, under some circumstances it may be that death taxes will have to be paid on transfers of land or other things the farmer made during his life. Careful estate planning usually can reduce the amount of taxes to be paid and minimize their effects.

The difference between the value of his assets and the amount of his liabilities is the approximate net value of the assets which will be available at the farmer's death, assuming, of course, that his present financial condition remains substantially unchanged. Once the farmer has determined this amount, he next should consider his family situation. As to each of his dependents the farmer should give thought to his or her age, needs, condition of health, business experience, and capability of self-support.

The general goal of a man of average means is provision for his dependents until their deaths or such time as they can support themselves. Thus if a farmer has small children he needs to provide for their support until they are grown. In the case of his widow, as a rule, unless she remarries, support until the time of her death should be provided.

Every farmer would like his decedent estate to provide for his dependents the same standard of living which he provided for them during his life. Few men, farmers or otherwise, have assets sufficient to make this possible, but one should arrange his affairs to protect his dependents as best he can.

Life insurance can play an important part in furthering the farmer's goal of security for his dependents. As a general rule, the proceeds of insurance payable other than to the insured's estate are not assets for payment of creditors of the deceased insured.⁶¹¹ In addition, when such insurance is payable to the widow it either is not subject to federal income taxation or has a preferred tax status.⁶¹² Death tax consequences of life insurance were earlier discussed at page 558.

If a farmer is a comparatively young man in good health, a well planned insurance program can provide at relatively low cost a sizeable fund for his dependents in the event of his early death. Moreover, even though he is well along in life, additional insurance still may be desirable for purposes such as to pay off a mortgage, or to provide the ready cash fund

611. See 2 APPLEMAN, INSURANCE LAW & PRACTICE § 1341 (1941). A South Carolina statute provides that life insurance in amount not more than \$25,000, by its terms taken out for the benefit of a married woman or her children or the children of her husband, is exempt from the claims of the husband's creditors. CODE OF LAWS OF SOUTH CAROLINA § 37-169 (1952). As yet the State Supreme Court has not found it necessary to determine constitutionality of the statute. *Wilson v. Insurance Co.*, 182 S. C. 131, 188 S.E. 803 (1936).

612. INT. REV. CODE OF 1954, § 101 (d) (1) (B).

needed at death for payment of last illness and burial expenses, death taxes, administration expenses, etc.

Before haphazardly buying insurance, however, a farmer should make certain that he is obtaining the type of policy best suited for his purposes. For example, it may be that term insurance, either with or without a conversion privilege, instead of ordinary life, best fits a particular farmer's program, since term insurance affords more protection per dollar of premium paid should he die within the term of the policy.

A qualified lawyer can advise as to the reliability of a particular insurance company or agent, the desirability of one type of policy rather than another, the person or persons to whom the policy should be made payable, and whether or not a particular option of payment should be elected by the farmer, or the decision left for the beneficiary to make after the farmer's death.

As a rule, a farmer with limited assets and a wife and minor children should make a will giving his entire estate to his wife.⁶¹³ If this is done, she can use the assets to best advantage for herself and the children in the event of the farmer's death. On the other hand, if he dies intestate, the children take a share of the estate (see page 527). This may necessitate the appointment of a guardian for the minor children,⁶¹⁴ a procedure entailing needless expense for the estate. Moreover, should it become necessary or desirable during the minority of the children to sell the intestate's land, a court proceeding involving considerable expense must be had to accomplish the sale.

In a case where all of a farmer's children are grown, unless it is clear that he has assets more than sufficient to provide for his wife, as a rule he likewise should make a will giving her his entire estate. For if there is no will the widow takes but part of the estate and is reduced to dependency upon

613. As regards the land, an alternative solution would be a gift to the wife for her life, with remainder in fee simple to the children, subject, however, to the wife's power during her life to convey in fee simple to anyone (including herself), and to make an unrestricted disposition of any purchase money received for a conveyance. Even though the husband's estate is a small one, it should be made certain that the power given the wife qualifies for the marital deduction. INT. REV. CODE OF 1954, § 2056 (b) (5). Although a similar disposition of the personal property may be made, generally speaking, an absolute gift thereof would seem preferable.

614. It seems that a guardian must be appointed if a minor is entitled to a sum of money exceeding \$1,000. See CODE OF LAWS OF SOUTH CAROLINA § 10-2551 (1952), as amended, 51 Stat. 344 (1959), Act No. 679, 1960.

the generosity of the children, a situation which too frequently results in hardship for her. Sometimes an even sadder situation arises when a childless farmer dies intestate, leaving as his heirs his widow and his blood relatives. When this happens the widow in some cases takes but one-half of his estate (see page 527), an amount which usually is wholly inadequate for her support in her old age.

If a farmer has a somewhat larger estate his lawyer can suggest dispositions, usually in trust, which not only will assure the widow adequate support, but also will provide for the farmer's children or other relatives after the widow's death. The trust was earlier discussed at page 502. By its employment a person can be given the beneficial enjoyment of wealth without the responsibility for its management. Such an arrangement is of particular value when provision is being made either for minors or for adult persons of limited business experience.

A primary question confronting every farm owner is whether his farm is to be disposed of at his death, or whether it is to be retained and its operation continued. Since considerations which affect this important decision were discussed earlier at page 496, they are not here repeated. As pointed out, regardless of whether a farmer determines that his farm should be sold or retained, in either case the estate planning preparations are of equal importance.

A final matter to be considered before a farmer talks with his lawyer is the selection of an executor to administer his estate. The executor's duties in the administration of an estate were earlier discussed. If no executor is named in a will, the administrator appointed in lieu thereof will have to furnish a bond, usually one written by a surety company, which means added expense for the estate. If the estate is a small one which will necessitate a merely routine administration, it may be advisable to name the wife as executrix and thus save the payment of executor's commissions to a third person. On the other hand, if the estate is a large one involving more complex administrative problems, on advice of his lawyer the farmer may decide to name as executor either an experienced individual or the trust department of a bank.

Once a farmer has assembled the facts as to his assets and liabilities, has considered his family situation, and has in general terms decided how his assets best can be used to benefit

his dependents, he then should consult his lawyer. Only after the latter has made certain that the farmer's basic plan is sound and entails no unnecessary expense, taxwise, or administrative, will he undertake preparation of the legal instruments necessary to effectuate that plan. While as a rule a will is the basic instrument of a farmer's estate plan, in some situations his lawyer may recommend immediate transfers of certain assets if the overall plan thereby is best served. Also, formalization during the farmer's life of informal arrangements, as for example, an oral father-son farming agreement, may be recommended.

Every farmer knows that the successful operation of a modern farm demands study and advance planning as well as long and hard hours of work. A farmer should not become so absorbed in his farming operations as to overlook the general planning necessary both for his own and his family's future.

Most farmers appreciate the need for prudent investment of their earnings. Fewer give thought to the matter of conserving their assets for their families after they themselves are dead. A farmer must realize that the security of his dependents when he is gone will depend not only on the value of the assets he accumulates, but to a very large extent on the estate planning measures he takes during his life.

Finally, he must remember the necessity of reviewing his plan with his lawyer from time to time. This will enable him to determine whether changes in his financial or family situation or in the law require the revision of his original plan. Only in this way can a farmer be assured that within the limitations of his assets he has provided the greatest possible security for his dependents.